TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 324

WILLIAM H. EDWARDS, FORMERLY UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, PLAINTIFF IN ERROR

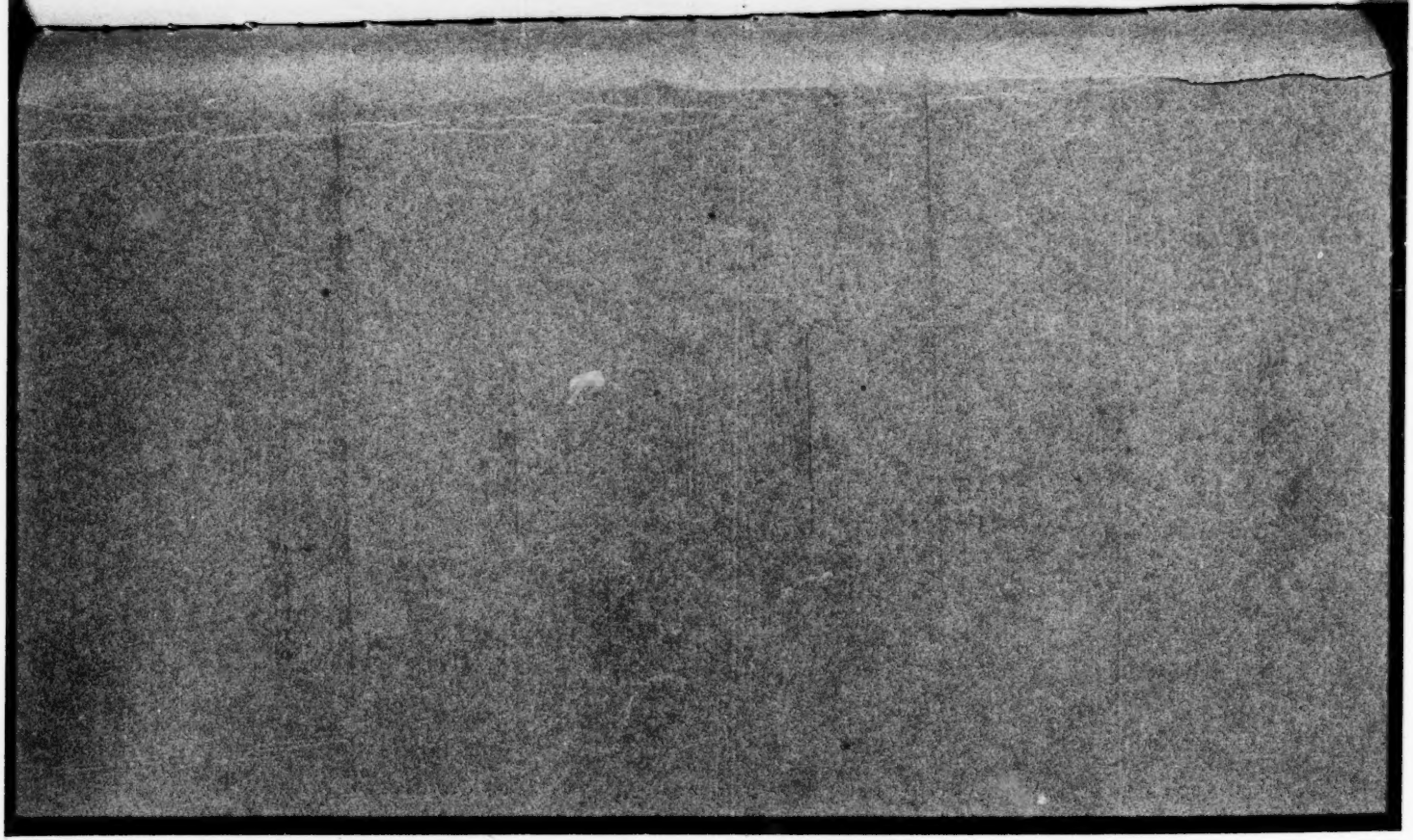
vs.

THE CUBA RAILROAD COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 12, 1924

(30191)



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1 *Writ of error*

Filed Feb. 14, 1924

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America

To the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the District Court before you, or some of you, between the Cuba Railroad Company, plaintiff, and William H. Edwards, formerly United States collector of internal revenue for the Second District of New York, defendant a manifest error hath happened to the great damage of said defendant as is said and appears by his complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the plaintiff aforesaid in its behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the judges of the United States Supreme Court, at the city of Washington, together with this writ, so that you have the same at the said place before the said Supreme Court aforesaid on the 12th day of March, 1924, that the record and proceedings aforesaid being inspected, the said judges of the United States Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

2

Witness the Honorable William H. Taft, Chief Justice of the United States, this 13th day of February, in the year of our Lord one thousand nine hundred and twenty-fourth and of the Independence of the United States the one hundred and forty-eighth.

[SEAL] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

M. J. MANDULEY,
U. S. District Judge.

[File indorsement omitted.]

3 In United States District Court for the Southern District of New York

THE CUBA RAILROAD COMPANY, PLAINTIFF,
against
WILLIAM H. EDWARDS, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, DEFENDANT. } L 21–64

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 11th day of November, in the year one thousand nine hundred and nineteen.

[SEAL] ALEX. GILCHRIST, Jr.,
Clerk.

LORD, DAY & LORD,
Plaintiff's Attorneys,
Office and post office address 49 Wall Street,
Borough of Manhattan, New York City.

4 In United States District Court

[Title omitted.]

Second amended complaint

The Cuba Railroad Company, by Lord, Day & Lord, its attorneys, for its second amended complaint, alleges upon information and belief:

First. At all the times hereinafter mentioned the plaintiff was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and is a resident of said State.

Second. At all the times hereinafter mentioned the defendant was the duly appointed and commissioned collector of internal revenue of the United States for the Second District of New York and is a citizen and resident of the Southern District of New York.

Third. On or about the 13th day of March, 1917, the plaintiff pursuant to the terms of the act of Congress, entitled "An act to

rease the revenue and for other purposes," approved September 1916 (hereinafter referred to as the "income tax act"), filed with defendant a return of its income for the year ending December 31st, 1916.

Fourth. Thereafter, in June, 1917, the Commissioner of Internal Revenue of the United States acting under and pur-ant to the terms of the income tax act assessed a tax against the laintiff of forty-six thousand one hundred and thirty-four and /100 dollars ($46,134.39), for the year ending December 31, 1916, d the plaintiff thereupon paid the amount of said tax to the de-dant, as such collector.

Fifth. Thereafter, and on or about the 1st day of January, 1918, Commissioner of Internal Revenue of the United States, pur-rting to act under and pursuant to the terms of said income tax, ongfully assessed an additional tax for the year 1916, amounting thirty-three thousand nine hundred and twenty-four and 32/100 llars ($33,924.32), upon the sum of one million six hundred and nety-six thousand two hundred and sixteen and 20/100 dollars 1,696,216.20), the said sum being the amount of certain subsidies ceived by the plaintiff from the Republic of Cuba, pursuant to the ovisions of an act of the Congress of the Republic of Cuba of July 1906. A copy of said act is hereto annexed and marked Ex-bit "A."

Sixth. The sum of one million six hundred and forty-two thou-nd two hundred and sixteen and 20/100 dollars ($1,642,216.20), t of said total payments of one million six hundred and ninety-thousand two hundred and sixteen and 20/100 dollars 1,696,216.20) was paid to the plaintiff by the Government of the epublic of Cuba, pursuant to the terms of a contract entered into between the plaintiff and the Republic of Cuba, dated the 25th day of March, 1909, an abstract of which is hereto an-nexed and marked Exhibit "E," as amended and modified by contract entered into between the plaintiff and the Republic of ba, dated the 22d day of January, 1910, an abstract of which is reto annexed and marked Exhibit "F." The said contracts were tered into in accordance with the provisions of the said act of Congress of the Republic of Cuba of July 5, 1906. By the ms of said contracts the plaintiff agreed to construct a railroad in Island of Cuba from Marti in the Province of Camaguey extend-through Bayamo Santa Rita, Jiguani, Baire to Palma Soriano, th a branch from Bayamo through Beguita and Yara to Manza-lo, a total distance of 328.44324 kilometers, and to reduce by one-rd its charges for government transportation over all its lines, d to transfer troops in case of war at a reduced rate, and to reduce ssenger fares over all its lines and the Republic of Cuba agreed in d contracts to pay the plaintiff at the rate of five thousand dollars 5,000) for each kilometer, when the said railroad had been com-

pleted, the said payment to be made in six annual instalments. Prior to the execution of said contract the plaintiff had partly constructed 30.99 kilometers of said railroad, relying upon assurances that the Government of the Republic of Cuba would enter into a contract with the plaintiff in accordance with the provisions of said act of July 5, 1906. After the execution of said contract dated March 25, 1909, the plaintiff commenced the construction of the balance of said railroad, and the entire line was completed in the year 1911, at a cost of four million eight hundred and fifty-one thousand five hundred and ninety-five and 02/100 dollars ($4,851,595.02), and thereupon the Cuban Government began paying said subsidies
7 in annual instalments pursuant to the terms of said agreements. The said payments were not made in equal instalments, but were paid to the plaintiff as follows:

1911	$273,702.70
1912	547,405.40
1913	150,000.00
1914	123,702.70
1915	273,702.70
1916	273,702.70
Total	1,642,216.20

Seventh. The sum of fifty-four thousand dollars ($54,000.00) out of said total payments of one million six hundred and ninety-six thousand two hundred and sixteen and 20/100 dollars ($1,696,216.20) was paid to the plaintiff by the Government of the Republic of Cuba, pursuant to the terms of a contract entered into between the plaintiff and the Republic of Cuba, dated the 30th day of June, 1915, an abstract of which is hereto annexed and marked Exhibit "G." The said contract was entered into in accordance with the provisions of the said act of the Congress of the Republic of Cuba of July 5, 1906, as supplemented by the act of the Congress of the Republic of Cuba of June 1, 1914. A copy of said act of June 1, 1914, is hereto annexed and marked Exhibit "B." By the terms of said contract the plaintiff agreed to construct a railroad in the Island of Cuba from Casilda through Fernandez to Placetas del Sur, a distance of 91.068 kilometers, and to transport mails on said railroad free of charge, to transport minor fruits at half rates, and to permit the government to maintain telephone and telegraph lines on the right of way. And the Republic of Cuba agreed in said contract to pay the plaintiff at the rate of six thousand dollars ($6,000.00) for each kilometer from Casilda to Fernandez, and twelve
8 thousand dollars ($12,000.00) for each kilometer from Fernandez to Placetas del Sur, the said payment to be made in six annual instalments as the construction work progresses. The plaintiff having been granted the concession to construct said branch railroad by a decree of October 19, 1914, under the same terms and conditions as those set forth in the said contract of June 30, 1915, subsequently entered into, immediately commenced the construction of said branch railroad, but the same had not been fully completed at the time this action was instituted. The cost of said railroad up

o June 30, 1919, was three million eight hundred and twenty-four housand six hundred and seventy and 64/100 dollars ($3,824,670.64). The first payment by the Government of the Republic of Cuba pursuant to the terms of said contract was fifty-four thousand dollars ($54,000.00) and was made in the year 1916.

Eighth. The said total payments of one million six hundred ninety-six thousand two hundred sixteen and 20/100 dollars ($1,696,216.20) were received in yearly installments during the period from 1917 to 1916, inclusive, as above set forth. Said payments were credited to a "suspense account" and on June 30, 1916, were transferred to the surplus account" and were used for capital expenditures. The cost of construction as carried on the books of the plaintiff was not reduced by said subsidy payments, but remained as originally charged. Depreciation was deducted on buildings and bridges, but not on the construction of the road and tracks. Shop machinery, tools, and equipment were not charged to the particular construction for which the subsidy was paid, as this section of the railroad when completed became a part of the main line. The rates of depreciation charged were figured on the original cost. Said subsidy payments were transferred to the surplus account, which account was used in computing the company's invested capital for the purpose of the excess profits tax returns for the year 1917 and subsequent years; that is, the subsidy payments were included in the invested capital under the heading surplus. Said subsidy payments were not income within the meaning of the sixteenth amendment of the Constitution of the United States.

Ninth. Thereafter, and on or about the 6th day of January, 1918, the defendant, purporting to act under and pursuant to the terms of the income tax act, notified the plaintiff of the said assessment and demanded the payment of the said sum of thirty-three thousand nine hundred and twenty-four and 32/100 dollars ($33,924.32), and threatened, in the event of the failure on the part of the plaintiff to pay said sum by the 16th day of January, 1919, to enforce the payment of said tax, together with penalties and interest provided by the said act, by distraint and sale of property.

Tenth. Thereafter, and on or about the 12th day of January, 1918, pursuant to said notice and demand, the plaintiff under duress and coercion, paid to the defendant the said sum of thirty-three thousand nine hundred and twenty-four and 32/100 dollars ($33,924.32), but under protest that no tax was due from the plaintiff and that the defendant was without authority to exact and collect the same, and solely in order to prevent the forcible collection of said tax and to avoid the imposition of penalties and interest and to avoid distraint and sale of its goods and property and other penalties provided by law for the nonpayment of such taxes.

Eleventh. As a matter of law said alleged tax was illegal and without warrant of law, and was erroneously, illegally, and without warrant of law assessed and computed against and

demanded of this plaintiff, and the defendant, as such collector of internal revenue, was without authority to demand, exact, or collect the said tax from the plaintiff or any part thereof.

Twelfth. Thereafter, and on or about the 3rd day of June, 1918, the plaintiff duly appealed to said Commissioner of Internal Revenue, according to the provisions of law and the regulations and ruling of the Treasury Department, and duly demanded the refund and repayment to it of said alleged tax, amounting to thirty-three thousand nine hundred and twenty-four and 32/100 dollars ($33,924.32), on the ground that the same had been erroneously and illegally assessed and collected; a copy of said application for refund is hereto annexed and marked Exhibit "C." On or about the 10th day of July, 1918, said Commissioner of Internal Revenue rendered a decision, wherein and whereby he granted said appeal to the extent of thirteen thousand six hundred and eighty-five and 14/100 dollars ($13,685.14), but denied and rejected said appeal and claim for refund to the extent of the balance amounting to twenty thousand two hundred and thirty-nine and 18/100 dollars ($20,239.18). A copy of said decision is hereto annexed and marked Exhibit "D."

Thirteenth. Neither said sum of one million six hundred and ninety-six thousand two hundred and sixteen and 20/100 dollars ($1,696,216.20), so received by the plaintiff as aforesaid, nor any part thereof, was taxable under the said income act, or under
11 any other law or act of the United States; no tax was due or has since become due thereon to the United States Government or to the defendant, as collector of United States Internal Revenue for the Second District of New York; and said sum of thirty-three thousand nine hundred twenty-four and 32/100 dollars ($33,924.32), was illegally and without warrant or authority of law demanded and collected by the defendant from the plaintiff.

Fourteenth. Thereafter, and on or about the 6th day of September, 1918, the Government of the United States, through its Treasury Department, refunded and repaid to the plaintiff the sum of thirteen thousand six hundred and eighty-five and 14/100 dollars ($13,685.14). The balance of said alleged tax, amounting to twenty thousand two hundred and thirty-nine and 18/100 dollars ($20,239.18), has not been refunded or repaid to the plaintiff, although due demand has been made therefor, and the same is now justly due and owing to the plaintiff with interest on the sum of twenty thousand two hundred and thirty-nine and 18/100 dollars ($20,239.18) from January 12th, 1918.

Fifteenth. This is a suit of a civil nature at common law, the matter in controversy exceeds, exclusive of interests and costs, the sum of three thousand dollars ($3,000), and this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

12 Wherefore the plaintiff demands judgment against the defendant, as collector of United States internal revenue for the Second District of New York, for the sum of twenty thousand two hundred and thirty-nine and 18/100 dollars ($20,239.18) thereon from January 12th, 1918, together with the costs of this action.

LORD, DAY & LORD,
Attorneys for Plaintiff,
25 Broadway, New York City.

13 [Jurat showing the foregoing was duly sworn to by Allen E. Foster omitted in printing.]

14 *Exhibit "A" to complaint*

Executive power. Department of public works

Tomas Estrada Palma, constitutional President of the Republic of Cuba

Be it known that Congress has enacted the following law, which I have sanctioned:

LAW

Article 1

The President is authorized to proceed, without the necessity of calling for bids, to contract with one or several companies, either native or foreign, for the construction and operation, in order as listed below, of the following standard gauge lines:

First. Line from Marti station on the line of the Cuba Railroad Company through Bayamo, Santa Rita, Jiguani Baire, and Palma Soriano connecting the line of the Cuba Railroad Company at San Luis with a branch which from the City of Bayamo shall reach to Manzanillo via Veguita and Yara.

Second. Line which, starting from the station of Fernandez on the Casilda and Trinidad Road, recently leased by the Government, shall join the Cuba Railroad at the station of Placetas del Sur.

Third. Line from Maricaragua to Cienfuegos.

Fourth. Line from Camaguey to Santa Cruz del Sur, which necessarily shall connect with the line of the Cuba Railroad Company.

5 Fifth. Line from Sagua to San Jose de los Ramos passing through Quemados de Guines, Corralillo, and Ceja de Palbo.

Sixth. Line from Victoria de las Tunas to Puerto Padre.

Seventh. Line from Cardenas to Coliseo with a branch to Guamacaro.

Eighth. Line from Guayabal to Neuvitas via Marti and Guaimaro.

Ninth. Line from Pinar del Rio to Esperanza, passing through Vinales.

Tenth. Line from Matanzas to Canasi.

Eleventh. Line from Guantanamo to Baracoa.

Twelfth. Line from Havana to San Jose, Jaruco, and Santa Cruz del Norte.

Article 2

The Republic shall grant a subsidy up to the amount of $6,000 per kilometer, official money, payable in six parts annually, to the companies which shall construct and maintain in use the standard gauge lines specified in the foregoing article, as soon as the work is done.

The individuals or companies who, at the time of this law's promulgation, have in course of construction for public service standard gauge lines building to any of the places specified in the preceding article, and who have complied with the provisions of Order
16 No. 34 of February 7th, 1902, in the first section of Chapter X, or who find themselves included in the provision of paragraph 1 of the third chapter of the same order, or who have a concession from the government for the construction of those lines, shall also enjoy the benefits accorded to the lines specified in article 1 of this law, for every kilometer constructed after the date of the promulgation of the same, the order in which these benefits are to be granted, however, remaining the same as specified in the law.

Article 3

The amount necessary for the annual payment of the subsidy shall be included in the general budget of the Republic. This amount shall not exceed five hundred thousand dollars annually, and in authorizing the construction of the lines this limitation and the order of preference specified in art. 1 shall be complied with.

Article 4

The companies entering into contracts with the executive for the construction and maintenance of the railroads subsidized by the present law shall be organized in conformity with the provision of chapter 4 of Civil Order No. 34 of February 7th, 1902, and shall show that they have fulfilled the obligations imposed in chapter 10 of the same order.

Article 5

The railroad commission shall have full authority and shall fulfill the duties imposed by Order No. 34 respecting companies
17 organized for construction and operation of subsidized roads.

Article 6

In case two or more individuals or companies applies for the concession to build and operate the railroad lines provided for in this

law, the President shall give the preference to the individual or company whose plans and other technical and economic conditions he shall consider most advantageous for the general interest of the Republic.

A year having passed after this law has been in force, the President may contract for the construction of the railroad lines therein enumerated, if any person or company shall petition for a contract to build the same, without reference to the precedence established in the first article, with the exception of the first and second lines in the list, which shall retain their preferential place.

Article 7

The President is authorized to agree with the contracting companies upon any changes which may become indispensable, if the topography of the land shall determine the advisability of altering the routes laid down in article 1. The change, however, shall not refer to the starting points or termini of the lines and branches specified in the first article.

Article 8

The lines subsidized by this law shall not enjoy any other special subsidy, direct or indirect, from the State, the Province, or the municipality. There is excepted from this provision only the
18 land necessary for the building of the lines, which may be ceded gratis.

Article 9

The President may dispose from the surplus funds of the treasury not affected by other special law of prior date of the amount necessary for any annual payment in case the payment falls due and the corresponding budget shall not yet have been approved.

Therefore, I order that the present law be fulfilled and executed in all its parts.

Given in the Presidential Palace in Havana the fifth day of July, of the year nineteen hundred and six.

T. ASTRADA PALMA.

RAFAEL MONTALVO,
Secy. of Public Works.

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19 *Exhibit "B" to complaint*

Article 1. There shall be added to the law of July 5, 1906, the following article: "The subsidy per kilometer for the construction of a railway from Casilda to Placetas del Sur shall be 6,000 pesos from Casilda to Fernandez and 12,000 pesos from Fernandez to Placetas del Sur, ending exactly at the triangle where the Cuban

Central connects with the Cuba Railroad. In the written contract it shall be stated that the concessionary company shall be obligated to carry public correspondence gratis on the lines of this railway, and small produce at 50% of the tariff; it shall also be obligated to allow the telegraph and telephone stations which the Government shall deem it advisable to establish at the sides of the lines."

Article 2. The construction, buildings, and equipment, which are at present in the possession of the State and can be utilized for the line referred to, shall be handed over to the enterprise which will carry out the work provided it agrees to begin it at both ends and to complete it within a term not exceeding three years.

Article 3. This law shall take effect from its publication in the Official Gazette of the Republic, and the call for bids for its construction shall be made within three months after publication.

Therefore, I order that the present law be fulfilled and carried out in all its particulars.

Given at the country residence "Duranona," Marianao, the 1st of June, 1914.

M. G. MENOCAL,
President.
JOSE R. VILLALON,
Secretary of Public Works.

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20 *Exhibit "C" to complaint*

Claim for refund. Taxes erroneously or illegally collected. Also amounts paid for stamps used in error or excess

STATE OF NEW YORK,
County of New York, ss:

The Cuba Railroad Company
(Name of claimant)

52 William Street, New York City
(Address of claimant)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant owns and operates a railroad in Cuba.
2. Character of assessment or tax income tax, year 1916 (state for or upon what the tax was assessed or the stamps affixed).
3. Amount of assessment or stamps, $33,924.32.
4. Amount now asked to be refunded, $33,924.32.
5. Date of payment of assessment or purchase of stamps, January 15, 1918.

Deponent verily believes that the amount stated in item 4 should be refunded, and claimant now asks and demands refund of said amount for the following reasons:

Said company duly filed its return for income of 1916 and in June, 1917, was assessed and paid a tax upon the basis of the net income shown by said return to have been earned in 1916. In said return, it did not report as income an item in the profit and
21 loss account appearing in its annual report to stockholders under the designation "Subsidy adjustments—$1,696,216.20."

In the summer of 1917 the Treasury Department examined the company's books of account for the years 1909 to 1916, inclusive. The examiner was F. N. Winslow. He appears to have filed his report in October. On October 17, 1917, Mr. L. F. Speer, Deputy Commissioner of Internal Revenue, wrote to the company that the report of the examination showed the company to be liable for additional taxes for each year, 1909–1916. To his letter H. C. Lakin, secretary of the company, replied on October 19, 1917, and further correspondence ensued as follows:

Mr. Speer to the company, December 3, 1917.

Mr. Lakin to Mr. Speer, December 29th, 1917.

Mr. Speer to Mr. Lakin, January 4th, 1918.

It will appear from those letters that the claim of the Government for all additional taxes for the years 1909, 1910, 1911, 1912, and 1913 was abandoned and that all but $47.50 of the claim on account of 1914 was abandoned and that the only claims not abandoned were the following:

1914—additional tax of $47.50.

1915—additional tax of $47.50.

1916—additional tax of $33,924.32.

Mr. Lakin in his letter of December 29th, 1917, agreed to investigate the two claims for $47.50 each. Such investigation was made, and the contention of the Government was found to be correct, the company's accountant having erroneously entered twice in each of the years 1914 and 1915 a payment of $4,750 dollars. As appears from Mr. Speer's letter of January 4, 1918, the additional taxes of $47.50 for 1914, $47.50 for 1915, and $33,924.32 were
22 assessed before the receipt of Mr. Lakin's letter of December 29th, 1917. The bills therefor were duly received and paid. This application is for a refund of the entire item of $33,924.32 for 1916, on account of the "subsidy adjustments" above mentioned.

So much of the above-mentioned correspondence as is appurtenant to this subsidy question is as follows:

Letter of Mr. Speer, Oct. 17, 1917:

"The additional tax recommended for for the year 1916 is based upon the proposed inclusion in gross income of a subsidy arising from the Cuban Government. This subsidy is in the nature of a donation or gift and represents income to your company for the

year in which received. Therefore it is probably included in your gross income."

Letter from Mr. Lakin, Oct. 19, 1917:

"You state that the additional tax is based upon the proposed inclusion in gross income of a subsidy arising from the Cuban Government, and you state in your letter 'This subsidy is in the nature of a donation or gift.'"

Letter from Mr. Speer, December 3rd, 1917:

"During the year 1916 the sum of $1,696,216.20 was received as a subsidy from the Republic of Cuba and it has been recommended that this amount be included in gross income, from which it was eliminated in preparing your original return. You state that this was a direct gift made by the Cuban Government to the railroad and that such donations and gifts are not taxable as income to the recipients.

"In reply you are informed that it has been consistently held that gifts made to corporations as distinguished from individuals should be considered income by the corporations and so reported to this office. This being the case, the amount in question is held to be income from your corporation and the additional tax of $33,924.32 based upon including such amount in income will be assessed at an early date, and notice of the same being due and payable will be given to you by the collector of internal revenue for your district."

23 Letter from Mr. Lakin, Dec. 29, 1917:

"I find on inquiry, however, that apparently all the subsidy payments were made prior to 1916 except possibly one item of $54,000.00. I have asked the Treasurer to furnish me with an exact statement of the subsidy payments. I know of my own knowledge that some of said payments were made as far back as 1911 or early in 1912. According to my understanding, these items were carried in suspense until all the payments had been made by the Cuban Government and were then finally all adjusted in the year 1916. Should these payments be treated as income of the years during which they were received or as income during the year 1916?"

Letter from Mr. Speer, Jan. 4, 1918:

"It is also noted that the subsidy received from the Cuban Government, which the examining officer recommended as being income for the year 1916, was not in fact received during the year 1916, but in prior years. If such is the case, this office is of the opinion that this subsidy or gift from the Cuban Government was income when received by the corporation and not necessarily when the amount was taken up through its profit and loss and surplus accounts.

"However, in view of the fact that the additional tax has been assessed against your corporation, it will be necessary for you to file a claim for the abatement or refund, as the case may be, for

any part of the additional tax assessed which is believed to be incorrect or excessive."

It thus appears that the Commissioner was of the opinion that the subsidy was a gift, and as such was taxable, but should be taxed at the rates prevailing in the years when actually received, and in his letter of January 4, 1918, he in effect suggests that the company file a claim for refund. Hence this claim. However, the claim is made for the full amount for reasons hereinafter stated.

24 (1) If the subsidy was a gift, was it taxable? The Commissioner has ruled "Yes," on the ground that the income tax laws of 1913 and 1916, and the corporation excise tax law of 1909 exempted only gifts to individuals.

(a) Act of 1909. This law taxed corporations "with respect to the carrying on or doing business." The tax was computed but not levied "upon the entire net income * * * received by it from all sources." The tax was levied upon the company for "carrying on or doing business." It was not an income tax. If the subsidy was a gift it was not taxable, even if it was income. A tax on income was not constitutional until after March 1, 1913. The tax was a tax on business done and the receipt of a gift can not be defined as doing business.

The portion of the subsidy received prior to March 1, 1913, was as follows:

1911	$273,702.70
1912	547,405.40
Total prior to March 1, 1913	821,108.10

Therefore the tax with respect to $821,108.10 should surely be refunded, amounting to $16,422.16.

(b) Act of 1913. This was an income tax law, not an excise tax law. Consequently the question as to the subsidy received from 1913 to 1915, inclusive, is whether it was income. The mere fact that it was received does not make it income.

In Southern Pacific Company v. Lowe (238 Fed. 850, 851) the court says:

"I do not think that 'income' as used in the statute, should be given a meaning so as to include everything that comes in. The true function of the words 'gains' and 'profits' is to limit the meaning of the word 'income' and to show its use only in the sense
25 of receipts which constituted an accretion to capital. So the function of the word 'income' should be to limit the meaning of the words 'gains' and 'profits.' The increased value of capital as such constitutes in one sense a gain or profit, but not income. Hence such gain or profit is not taxable, but only such profits and gains as constitute income are taxable. This in substance was what the court held in Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, and in Gauley Mt. Coal Co. v. Hays, 230 Fed. 110, 144 C. C. A. 408.

"In the early case of People v. Davenport, 30 Hun (N. Y.) 177, it was said that 'income' is that which capital earns remaining itself 'intact.' This definition was recently adopted in Mitchell v. Doyle (D. C.) 225 Fed. 437.

"Often receipts come in which are but a change of capital investment or which represent a distribution of capital assets. In that case, there is no gain or profit. If such receipts were regarded as income, the taxpayers' capital is depleted."

In the United States v. Guggenheim Exploration Co. (238 Fed. 235, 237) the court says:

"What is income? The flow of capital's service is its income. A disservice is a negative service. A flow of disservice or negative income is called 'outgo.' The income of our capital is that which it does for us.

"The word 'income' is not synonymous with the word 'receipts.' Von Baumbach v. Sargent Land Co. 219 Fed. 31, 134 C. C. A.

"649. Income as used in the statute must be considered in contradistinction to property and invested capital."

The same court in the case of Towne v. Eisner (242 Fed. 704, reversed on other grounds, 245 U. S.) says:

"Gains and profits from business can only be taxed under the present income tax act by virtue of ownership of the property from which they are derived."

26 It appears, therefore, that a subsidy, if it is a gift, is not income because it is an accretion to capital and was not earned by the capital which it increased nor by property owned by the company.

The income tax law of 1913 provides under "B" that "the net income of a taxable person shall include gains, profits, and income derived from * * * any source whatever, including the income from but not the value of property acquired by gift." Under "G" the law provides that the "normal tax hereinbefore imposed upon individuals likewise shall be levied * * * to every corporation." It seems clear that income receipts were understood by the framers of the law to be the same with individuals and corporations. When it comes to deductions, however, the individual and the corporation are not treated alike. Therefore, the net income of an individual may be very different though the gross income may be the same. But, in ascertaining gross income, we submit that the law makes no distinction between individuals and corporations; and that if a gift to an individual is not a part of his gross income for the purposes of the tax, it is not a part of the gross income of the corporation. The law says it is not income at all.

The portion of the subsidy received while the act of 1913 was in effect was as follows:

1913	$150,000.00
1914	123,702.70
1915	273,702.70
Total	547,405.40

Therefore the tax with respect to this period should surely be refunded, amounting to $10,948.10.

(c) Act of September 8th, 1916. This was also an income tax law. It changed the rates of the tax and also rearranged d modified the language of many provisions of the law as it was 1913. The only place where it treats of gifts is section 4. It very ecifically provides as follows:

"The following income shall be exempt from the provisions of is title: The proceeds of life insurance policies paid to individual neficiaries upon the death of the insured; the amount received the insured, as a return of premium or premiums paid by him der life insurance, endowment, or annuity contracts, either during e term or at the maturity of the term mentioned in the contract or on the surrender of the contract; the value of property acquired gift, bequest, devise, or descent (but the income from such prop-y shall be included as income); interest upon the obligations of State or any political subdivision thereof or upon the obligations the United States or its possessions or securities issued under the ovisions of the Federal farm loan act of July seventeen, nineteen ndred and sixteen."

To be sure section 4 appears in Part I of the act, and Part I pur-rts to relate to the tax of individuals. Nevertheless, the only place the act where interest upon the obligations of a State or any litical subdivision thereof, or upon the obligations of the United ates or its possessions, or upon securities issued under the Federal rm loan act is exempted from the income tax is this precise section and we do not understand that the Treasury Department or the mmissioner of Internal Revenue has ever ruled that for that son interest received by a corporation upon State or municipal nds or United States bonds or Federal farm loan bonds is subject to the income tax against corporations. Moreover any tax act must be construed strictly against the Government, and said section 4 specifically states that the value of property uired by gift "shall be exempt from the provisions of this title," l by the words "this title" is meant the income tax law, being e 1 of an act to increase the revenue and for other purposes in ect September 9th, 1916.

Moreover, it clearly appears from the context of the law itself t section 4 was intended to apply to both individuals and cor-rations. As an illustration, section 5 of the act begins with the rds "that in computing net income in the case of a citizen or resi-nt of the United States" certain deductions shall be allowed. e act elsewhere defines citizens and residents in such a way as to w that they are individuals.

The portion of the subsidy which was received in 1916 was 7,702.70, and the tax thereon, amounting to $6,554.06, should rly be refunded.

Summary:

Tax to be refunded under law of 1909 (subdivision (a) supra)	$16,422.16
Tax to be refunded under law of 1913 (subdivision (b) supra)	10,948.10
Tax to be refunded under law of 1916 (subdivision (c) supra)	6,554.06
Total tax to be refunded	$33,924.32

(d) Commissioner's theory. The refundment upon the theory set forth in the above-quoted letters of Mr. Speer, viz, that the subsidy was a gift and was taxable as against a corporation, would be as follows:

1% on $273,720.70 received by company in 1911	$2,737.03
1% on $547,405.40 received in 1912	5,474.05
1% on $150,000.00 received in 1913	1,500.00
1% on $123,702.70 received in 1914	1,237.03
1% on $273,702.70 received in 1915	2,737.03
Total refundment	$13,685.14

The company, however, claims that it is entitled for the reasons above stated to a refund of the entire amount of $33,924.32.

II. The subsidy was not like a mail subsidy. It was in this instance a capital, not an income payment. It was given pursuant to an act of the Cuban Congress which became a law on July 5, 1906. A copy of the law is hereto attached, marked Exhibit "A." Its purpose was to enable new railroad lines to be built. The subsidy was the Government's share of building a railroad, not operating it. It was paid pursuant to contract and not as a gift. The subsidy in question was paid for the first two lines referred to in the law. Not being a gift and not being an income subsidy, this full amount of subsidy was free from any liability for an income tax.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented except as stated herein for the refunding of the whole or any part of the amount stated in Item 3.

G. H. WHIGHAM,
President.

Sworn to and subscribed before me this 3rd day of June, 1918.

[SEAL] LEONARD LEAMAN,
Notary Public, New York County #32.

30 "Exhibit A" annexed to this application for refund is the same as "Exhibit A" annexed to this amended complaint.

31 *Exhibit "D" to complaint*

IT:CL
JFG

TREASURY DEPARTMENT,
Washington, July 10, 1918.

Cuba Railroad Co., 52 William Street, New York City.

SIRS: Your claim for the refund of $33,924.32, additional corporation income tax for 1916, has been carefully examined.

Your contention is that the amount of $1,696,216.20, designated in your accounts as "subsidy adjustment," is not subject to tax, for

reason that the same is a gift and not income within the purview
he special excise and income laws.
he evidence shows that the above amount which you received as
ubsidy from the Cuban Government was predicated on the pro-
on of law which states that the Republic (Cuban) shall grant a
sidy up to the amount of $6,000 per kilometer, official money, pay-
in six parts annually to the companies which shall construct and
ntain in use certain standard-gauge lines of railroad as soon as
work is done.

t is evident from this provision of law that these payments were
gifts, something voluntarily given without return or service, but
unts turned over to you upon a bona fide agreement or contract
if certain operations were carried out, that is, if specified lines
ailroad were constructed and maintained in use, stipulated sums
noney were to be paid. The payment of this subsidy was, there-
, contingent upon work performed or services rendered. It is
that said amount was received as the result of "carrying on or
g business" within the meaning of the special excise and income
laws, and is, therefore, properly returnable as taxable income
appears, however, that a portion of said subsidy was paid prior
916, the year in which it was taken up and reflected in the profit
loss account. Since a tax of 2% was therefore paid on
ntire amount of this subsidy and since it is held in accordance
letter from this bureau dated January 4, 1918, that payments
income when received by the corporation an overpayment of
as been made on the following amounts:

Amount received in	1911	$273,702.70
" " "	1912	547,405.40
" " "	1913	150,000.00
" " "	1914	123,702.70
" " "	1915	273,702.70
Total		1,368,513.50
same at 1%		13,685.14

ordingly the claim has been allowed for $13,685.14 and re-
for $20,239.18.
Respectfully,

(Sgd.) L. F. SPEER,
Acting Commissioner.

Exhibit "E" to complaint

[Translation]

ate Pelayo Garcia y Santiago, Counsellor at Law and Notary,
Habana

Number eighty-four

VENTION CONTRACT FOR THE BUILDING OF RAILROAD LINES

e city of Habana, this twenty-fifth day of March, one
d nine hundred and nine, before me, Licentiate Pelayo Gar-

cia y Santiago, counsellor at law and notary public of the same district and college of this city, residing in the same and in the presence of the witnesses hereinafter to be mentioned, appeared at the Presidential Palace, whereto I went previously and especially summoned.

As a party of the first part Major General Jose Miguel Gomez, constitutional President of the Republic of Cuba, who stated that he was a native of Sancti-Spiritus, in the Province of Santa Clara married, of legal age, and a property owner.

And as a party of the second Doctor Pablo Desvernine y Galdos, a native of the city of Habana, married, of legal age, a lawyer, and a resident of this city of Habana.

They appear, Major General Jose Miguel Gomez, in his capacity as constitutional President of the Republic of Cuba, in representation of the executive power of the nation; and Doctor Pablo Desvernine y Galdos as special legal representative of the "Cuba Railroad Company," a corporation, pursuant to powers expressly vested in him by board of directors of said corporation and a resolution of said board of directors hereinafter copied in this deed.

34 Said appearers assert to me that they enjoy the free use of their civil rights, having, as in my judgment, they have, the necessary legal capacity to enter the present contract, and Doctor Pablo Desvernine y Galdos says:

First. That the Cuba Railroad Company, a corporation, undertakes the construction and operation of a standard gauge railroad line, to be operated as a railroad for public use, from a point above ten kilometers southeasterly from Marti station, on the line of the Cuba Railroad Company, in the Province of Camaguey, in this Republic, connecting at said point and extending through Bayamo, Santa Rita, Jiguani, Baire to Palma Soriano, there to connect with the line already constructed extending to San Luis in the Province of Santiago de Cuba; and another line, also of standard gauge, for public use, starting from the city of Bayamo to Manzanillo via Beguita and Yara. That said lines shall be constructed substantially in accordance with the explanatory statement filed by the company he represents with the Cuba Railroad Commission, with no further changes than those which may and should be made subject to the provisions of the law of subventions of July 5th, 1906, and the railroad law, and subject also to the approval of the railroad commission; and that said lines connecting Marti, Bayamo and Manzanillo shall be laid by the 15th of September, 1910, and those connecting Bayamo and Palma Soriano within eight months thereafter.

Second. That the Cuba Railroad Company further undertakes to reduce on all its lines, constructed or to be constructed, by one-third the present tariff for the transportation of permanent em-

35 ployees of the Government of the Republic of Cuba, of the Rural Guard, of the Artillery, and other Government troops, and to transport over any and all of its lines at the rate of one cent

r man per kilometer in special trains the troops of the Republic
hich may be moved by the Government in case of war of any dis-
rbance of the public order.

Third. That the company by him represented further undertakes
reduce on all its lines the present tariff to two and four-tenths
nts for first-class passengers per kilometer.

Fourth. The constitutional President of the Republic of Cuba, in
half of the executive power of the nation, states: That by virtue
the authority established by article one of the law of July 5,
06, he binds the State to the payment to the Cuba Railroad Com-
ny by way of subventions the sum of six thousand dollars official
rrency per kilometer, said kilometers to be payable by six parts
nually as the same are finished, all according to the provisions
ntained in the first paragraph of article 2 of the law of July 5,
06.

Fifth. Mr. Pablo Desvernine y Galdos, with the representation
possesses, accepts the subvention in the form expressed in the
regoing paragraph, and states: That the company by him rep-
ented acknowledges the right of the Republic of Cuba to reduce
h subvention at the rate of five thousand dollars per kilometer,
ovided that at any date in which the railroad company shall have
laid in the aggregate 100 kilometers of connected track, the
Republic of Cuba, duly authorized therefor, shall pay the
company the full amount of $500,000 official currency, the
ue of said 100 kilometers at the aforementioned rate of $5,000
h, and also pay the remainder of said subvention at the rate of
thousand dollars per kilometer, in cash, when the company shall
ve terminated the laying of the track from said point located
ut ten kilometers southeasterly of the Marti station to Palma
iano and the branch from Bayamo to Manzanillo it being under-
od that in order that said company be entitled to the payment of
l amounts, respe tively, it shall be sufficient for it to complete
laying of the lines of each of the two sections mentioned, but the
pany binds itself hereby to proceed immediately thereafter to do
atever else may be necessary to make said lines conform sub-
ntially in engineering features with the present main line of the
a Railroad Company; and Dr. Desvernine further acknowledges
right of the Republic of Cuba, in such case of reduction of the
vention to the rate of $5,000 per kilometer under the conditions
einbefore set forth, to pay said subvention in the following form:
art of the $500,000 for the first 100 kilometers by the cancella-
of that amount of $135,000 of the then existing indebtedness of
l company to the Republic of Cuba for the loan without interest
le to said company by public deed of September 8, 1905, before
notary public of this city, Dr. Francisco Palma y Castillo, the
ublic of Cuba also paying as part payment of the subvention
the remaining kilometers the sum of $169,000 by the cancellation
he amount of the then existing indebtedness of the company to

the Republic of Cuba on said loan; but it being further
37 understood that aside of said sums which may be paid through said respective cancellation all the rest of the subvention up to its complete aggregate at the rate of $5,000 per kilometer shall be paid by the Republic of Cuba in cash official currency and at the time or instalments herein before mentioned. He further agrees that in case of payment of the subvention at the rate of $5,000 and of its payment in the two instalments and under the conditions aforementioned, the Government of the Republic of Cuba may retain from the amounts to be paid in each of said two instalments the sum of $100,000 to guarantee the fulfilment by the company of the obligation which it accepts to do, after the laying of the line and the two respective payments, whatever may be necessary to make said subventioned lines conform in engineering features with the present main line of said railroad company, the government turning over to said company each of the two above-mentioned sums of $100,000 as soon as the company opened to public use the respective kilometers constructed.

The appearers with the capacity they enjoy designate this city for all judicial or extra judicial acts and notifications derived from the contract.

They state that all costs and expenditures caused by this deed with two certified copies and the payment of the fiscal taxation, shall be defrayed by the Cuba Railroad Company. They have been warned by me as to the provisions concerning the payment of real estate transfer tax contained in the regulation in force for the transfer of real estate and property.

I, the notary, do hereby certify that Dr. Desvernine, to
38 show that the company by him represented is in a position to enter into this contract, pursuant to the provisions contained in article 4 of the above-mentioned law hands me, to be added to this deed, the following instruments: A certificate issued by the secretary of the railroad commission of the Republic, showing that book first, register of companies for public use, kept by said commission pursuant to the provisions of paragraph two, article one, chapter 4, of Order No. 34, Series 1902, the corporation named "The Cuba Railroad Company" was declared and registered as a railroad for public use, having further registered in said office the certificate of incorporation or deed of constitution of the company and the by-laws of the same and a declaration of three members of its board of directors asserting that at least 20 per cent of the capital stock has been subscribed to and that at least 20 per cent of the aggregate of such subscription had been in good faith paid in in cash to the deponents named in said deed; said certificate further showing the deposit made with the Treasury of the Republic of the sum of $58,000 official currency, through certified check of the National Bank of Cuba, No. 1192, to guarantee the construction of the 290 kilometers, more or less, of lines authorized from Marti, via

Bayamo, Santa Rita, Jiguani, and Palma Soriano, with a branch from Bayamo to Manzanillo; another certificate from the said secretary of the railroad commission showing that the archives of said commission contain the proceedings related to the construction of said railroad lines, said proceedings showing the filing and approval by said railroad commission of the descriptive statement, plans and outline of the aforementioned lines, and certificates
39 issued by the municipalities of Camaguey, Bayamo, Puerto Padre, Jiguani, Palma Soriano, San Luis, and Manzanillo, asserting that the statement, plans, and outlines of the above-mentioned railroad lines proposed to be constructed and referred to in this deed remained deposited in the archives of the respective companies.

I, the notary, do hereby further certify that Dr. Desvernine y Galdos, has presented to me and I have returned to him a certificate issued on the 4th inst. by the mercantile registrar of this city, showing that said corporation, the Cuba Railroad Company, has been duly registered under page 2884 of corporations, folio 88 of book 60, first entry.

I do further certify that the powers vested in Dr. Desvernine y Galdos for this present execution appear from the translation into Spanish of the power of attorney and resolutions hereinbefore mentioned, and the literal transcription of which reads as follows:

The Cuba Railroad Company. Power of appointment to Doctor Pablo Desvernine y Galdos

Know all men by these presents, that pursuant to the provisions of section 111, Article IV, of the by-laws of the Cuba Railroad Company, a corporation of the State of New Jersey, United States of America, and by the authority and direction contained in resolution of the board of directors, certified copies of which section of the said by-laws and of which resolutions are hereunto annexed, the said the Cuba Railroad Company hereby elects, makes, constitutes and appoints Doctor Pablo Desvernine y Galdos, lawyer, of the city of Havana, Republic of Cuba, the special legal representative of said the Cuba Railroad Company to effect and carry out,
40 on its behalf and in its name, a contract with the Government of the Republic of Cuba, or with the executive of said Republic, or any official duly authorized to act in representation of said executive, in accordance with the law of subvention (Ley de Subvenciones) of the Republic of Cuba, of the 5th of July, 1906, as published in the Gaceta Oficial of the same date, for the construction and operation of a standard gauge railroad line for public use from a point about ten (10) kilometers southeasterly from Marti station, on the line of the Cuba Railroad Company, in the Province of Cumagney, in the island of Cuba, from which station line of railroad has, since the enactment and publication of the

law aforesaid, been constructed by said railroad company, and extending from a connection with said line of railroad at said point through Bayamo, Santa Rita, Jiguani, and Baire to Palma Soriano, there to connect with the line of railroad about twenty-one (21) kilometers in length, extending thence easterly to the line of the Cuba Railroad Company at San Luis, Province of Orinente, which line of railroad from Palma Soriano to San Luis has been constructed by said railroad company since the enactment and publication of the law aforesaid: and for the construction and operation of a branch line of railroad from the city of Bayamo to Manzanillo via Veguita and Yara: said lines of railroad to be constructed substantially in accordance with the explanatory statement or memoria heretofore filed by said railroad company with the railroad commission of the Republic of Cuba: the track to be laid connectedly on the Marti-Bayamo-Manzanillo sections of said railroad lines by the fifteenth day of September, 1910, and between Bayamo and
40a Palma Soriano within eight (8) months thereafter; with the provision in the contract that the Cuba Railroad Company shall receive from the Republic of Cuba a subvention up to the amount of six thousand dollars ($6,000) per kilometer, official money, payable in six parts annually to said company as soon as the work is done: with right in the Republic of Cuba to reduce such subvention to the rate of five thousand dollars ($5,000) per kilometer, provided that, in such case, whenever said railroad company shall have laid in the aggregate one hundred (100) kilometers of connected track the Republic of Cuba shall pay to the company the full amount of five hundred thousand dollars ($500,000), and when said company shall have completed the laying of the track for the entire line from said point about ten (10) kilometers southeasterly from Marti station to Palma Soriano, and said branch line from Bayamo to Manzanillo, the Republic of Cuba shall pay, at the rate of five thousand dollars ($5,000) per kilometer, the remainder of said subvention: with further provision that after such payment, upon completion of the laying of the track, the said railroad company shall proceed immediately to do whatever else may be necessary to make said lines of railroad conform substantially in engineering features with the present main line of the Cuba Railroad Company; with right in the Republic of Cuba in such case to pay a part of the subvention for the first one hundred (100) kilometers by the cancellation of the amount of one hundred and thirty-five thousand dollars ($135,000) of the then existing indebtedness of said railroad company to the Republic of Cuba, and to pay as part of the
41 subvention for the remaining kilometers included in said subvention, the sum of one hundred and sixty-nine thousand dollars ($169,000) by the cancellation of that amount of such then existing indebtedness: with further provision that if the subvention at the rate of at least five thousand dollars ($5,000) per kilometer shall be authorized by the Republic of Cuba with respect to the ten

0) kilometers of railroad already constructed as aforesaid south-
sterly from the Marto station and said twenty-one (21) kilometers
railroad constructed as aforesaid between San Luis and Palma
riano, the Republic of Cuba shall have the right of paying such
rther subvention through the cancellation of a corresponding
nount of such indebtedness; it being understood that if said in-
btedness shall in any case aforesaid be less than the amounts thus
thorized to be paid through the cancellation of indebtedness
mpletion of payment of the subvention shall be made in money,
wer also being hereby given to contract that said railroad com-
ny shall for all its lines, constructed or to be constructed, reduce
one-third the present tariff for the transportation of permanent
ployees of the Government of the Republic of Cuba, and of the
ral Guard of the artillery and other troops of the Government,
l shall transport over any or all of its lines, at the rate of one
t per man per kilometer in special trains, the troops of the
public which may be moved by the government in case of war or
disturbance of public order, and to contract that said railroad
npany shall reduce for all its lines the present tariff for first-
class passengers to two and four-tenths cents per kilometer;
with full power to said Pablo Desvernine y Galdos, as such
special legal representative, to execute, acknowledge, and de-
er, on behalf of said the Cuba Railroad Company, any deed or
trument of notarial document in order to carry out such contract
h the Republic of Cuba into full effect, with such provisions and
ulations as may be agreed upon between said Pablo Desvernine y
dos and the executive or other representative of the Republic
Cuba, said attorney being also specialy authorized to collect and
ive from the Republic of Cuba the instalments and payments of
subvention, and to execute, acknowledge, and deliver proper
ipts therefor.

n witness whereof the said The Cuba Railroad Company has
sed its signature to be hereunto subscribed on its behalf by its
sident and its corporate seal to be hereunto affixed, this twenty-
rth day of February, 1909.

EAL.] THE CUBA RAILROAD COMPANY,
By W. C. VAN HORNE,
President.

ttest:
HERBERT C. LAKIN,
Secretary.

further certify that I have had before me the original power
uted in favor of the appearer, Mr. Desvernine, and written in
English language, which shows that the signature of the notary,
Leonard Leaman, has been duly certified by Mr. Peter J. Dool-
clerk of county of New York, and the latter's signature by the

consul general of the Republic of Cuba in New York, Mr.
43 Antonio Altamira, whose signature was in turn certified to by the secretary of state of this Republic.

I further certify that Doctor Desvernine has delivered to me, with the purpose that they form part of this deed, the originals in English and the official translations duly certified to, of the power of attorney executed in his favor by the president of the board of directors of the Cuba Railroad Company on the 10th of March of the present year, and of the certified copy of the resolution of said board passed February 24th ultimo, directing said president to execute said power of attorney by which Mr. Desvernine is authorized to agree with the government of the Republic of Cuba as directed in the latter part of paragraph 5 of this deed.

It has thus been executed, the witnesses being Messrs. Jose Notario y Reyes and Fidel Aragon y Vera, residents of this city, and who state that there is no legal exception to their acting as such.

Having read this instrument at their request to the executors and witnesses, the former ratify the contents and sign with the latter, to all which, as well as to the knowing the appearers, I, the notary, do hereby certify, and also that the following correction was made with their approval: On erasure constitutional.—Jose M. Gomez—Pablo Desvernine—Jose Notario—Fidel Aragon—L. Pelayo Garcia.

I, Licentiate Alejo Sanchez y Acosta, secretary of the Railroad Commission, do certify that in vol. 1st, register of railroad companies, pursuant to the provisions of paragraph 2, article 1, chapter 4, Order No. 34, series 1902, under folio 12 and by resolution of the commission dated May 16, 1902, the corporation named the Cuba Railroad Company was declared and entered as a railroad for public use, also entering in said register the certificate of
44 incorporation or deed of constitution of said company, as well as its by-laws, and that among the instruments entered in said register of companies, one was the declaration of three directors of said company, asserting that at least 20% of the capital stock had been subscribed to and that at least 20% of the aggregate of such subscription had in good faith been paid in in cash to the deponents named in the deed.

I further certify that proceedings (expedients) exist with the railroad commission relative to the projects of lines of the Cuba Railroad Company, from Marti to San Luis, via Bayamo, Santa Rita, Jiguani, and Palma Soriano, with a branch from Bayamo to Manzanillo, in which proceedings appears a document which literally copies read as follows:

REPUBLIC OF CUBA

Department of the Treasury No. 126, E,
Railroad Commission. 7/13/1907

HABANA, *July 12, 1907.*

. President of the Railroad Commission.

SIR: I have the honor to enclose herewith acquittance No. 615 for
8,000 official currency, represented by check No. 1192 of the
tional Bank of Cuba, in the name of the Cuba R'd Co., amount
posited with the office of the treasurer general in bond to guaran-
the construction of 290 k. of track, as requested by you in your
ter dated the 18th of June ult.

Yours very truly,

(Signed) GABRIEL GARCIA ECHARTE,
Acting Secretary of the Treasury.

Republic of Cuba, under the provisional administration of the United States. Railroad Commission.—Republic of Cuba, Department of the Treasury.—Office of the Treasurer General. Acquittance No. 615.—For $58,000.—General Head-.—Deposits and Bonds.—Subheading.—Bond.—Francisco Ibern, ting General Treasurer of the Republic.

Received of the Cuba R'd Co. the sum of $58,000 official currency, presented by certified check No. 1192 of the National Bank of ba, to guarantee, pursuant to the provisions of art. 1, chapter , Order No. 34, Series 1902, the construction of about 290 kilo-ters of track, for which it has been authorized, said track to run m Marti via Bayamo, Santa Rita, Jiguani, to Palma Soriano, h a branch from Bayamo to Manzanillo. Habana, July 12, 1907. tered. (Signed J. Morales de los Rios, Chief Accountant of the easury.)

(Signed) Francisco Ibern, Acting Treasurer Generale.

tered in the accounting department. (Signed) O. Saavedra.

tered in the Department of the Treasurer. (Signed) Rafael Brito.

A true copy of the original return to the company interested, bana, July 13, 1907.

Signed) Alejo Sanchez.

nd at the request of Dr. Pablo Desvernine, representative of the a Railroad Company, I have issued these present by direction of President, under the hand and the seal of the commission, in ana, this 27th day of February, 1909. B. Laguerela, president he railroad commission; Licentiate Alejo Sanchez, secretary of railroad commission. (Seal).

Republic of Cuba.—Railroad Commission.

Licentiate Alejo Sanchez, secretary of the railroad commission, do certify, that in the archives of the railroad commission under my care proceedings exist relative to the project of a line of the Cuba Railroad Company from Marti,

to San Luis, via Bayamo, Santa Rita, Jiguani, and Palma Soriano, with a branch from Bayamo to Manzanillo, in which proceedings the following documents appear:

The Cuba Railroad Company.—No. 647 E.—Railroad Commission 6/9/1906.—Habana, September 6, 1906.

Mr. President of the Railroad Commission.

HONORABLE SIR: I, Manuel de J. Manduley, general representative of the Cuba Railroad Company, have the honor to present to you the statement, plan, and outline of a railroad line for public use from Marti to Bayamo and San Luis with its branch to Manzanillo, aggregating in all 290 kilometers; certified check No. 1192 of the National Bank of Cuba to the order of the Secretary of the Treasury of the Republic of Cuba for the sum of $58,000 currency as a security of the 290 kilometers which said line shall have at the rate of $200 per kilometer.

The purpose for which this is represented is to comply with the provisions of the law of July 5, 1906, in order that this company may be considered an aspirant to the subvention contract established by said law, as otherwise said enterprise would not deem convenient to construct such line at present. I beg the commission, in case said contract should in due time be granted to this company, to approve the statement, plan, and outline herewith filed, and to consider deposited the certified check, issuing proper acquittance therefor, as well as a certificate of the statement and of its approval.

Very respectfully,

(Signed) M. J. MANDULEY.

46a The Cuba Railroad Company.—Statement, explanatory of the road and general condition, as well as of the manner in which the Cuba Railroad Company proposes to construct the railroad line for public use, which starting from the Marti station, which said company has on its present line, shall run through Bayamo, Santa Rita, Jiguani, Baire, and Palma Soriano, again making a junction with the Cuba Railroad Line at its San Luis station, with a branch which starting from Bayamo shall run to Manzanillo, via Veguita and Yara.

HABANA, *December 20, 1906.*

Mr. President of the Railroad Commission.—

SIR: I, Manuel de J. Manduley, representative of the Cuba Railroad Company, have the honor to express to you that under date of September 5th of the present year I filed with your commission the statement, plan, and outline of a railroad line for public use from Marti to Bayamo and San Luis, with a branch to Manzanillo, with an aggregate of 290 kilometers, having accompanied, pursuant to Order No. 34 of February 7, 1902, the security of $58,000 in a certified check of the National Bank of Cuba at the rate of $200 per kilometer.

The executive not having reached a resolution on the concession of a contract of subvention to said line and its branch established

the law of July 5, 1906, it became necessary to file such documents conditionally, because if it had been done with a definite charter and this company were not granted to subvention contract the security would have been forfeited according to said Order 34 of February 7, 1902, as no possibility existed for the construction of a second line without subvention through completely depopulated territories which, furthermore, at some places seems forbidden by the nature of the land.

But in view of the delay in the Government to decide on the application for subvention and that the present dry season of the year, the proper one for the construction of railroads in Cuba, may be lost, this company desires to proceed immediately to the construction of the line and branch referred to, considering, therefore, definitely filed the statement, plan, and outline and the security above mentioned.

Considering all these reasons, I beg the commission to approve said statement, plan, and outline, and that a certificate be issued some of the former and its approval, and a duplicate of the two later with an endorsement certifying also to their approval, in order to be able to start in the work without loss of time.

Very respectfully,

(Signed) M. J. MANDULEY.

The Cuba Railroad Company.—No. 1978 E.—Railroad Commission.—18/2/1907.

The Cuba Railroad Company Power of Appointment to Doctor Pablo Desvernine y Galdos

Know all men by these presents that, whereas the board of directors of the Cuba Railroad Company, at its meeting held on February 1909, appointed Doctor Pablo Desvernine y Galdos, the special general representative of said company, to effect a contract with the Government of the Republic of Cuba for the construction of a line railroad from Marti to Palma Soriano, with a branch from Cayamo to Manzanillo, which contract shall contain a provision that in case the subvention to be paid thereunder by the Government the Republic of Cuba shall be at the rate of $5,000 per kilometer the Republic of Cuba shall pay on account of said subvention the sum of $500,000 whenever the railroad company shall have laid 100 kilometers of connected track, and shall pay the remainder of said subvention when the railroad company shall have completed the laying of the track for said entire line and branch line, and

Whereas, pursuant to said resolution, the president and secretary of the Cuba Railroad Company, duly executed and delivered to said Doctor Pablo Desvernine y Galdos a power of attorney pursuant to said resolution.

Now, therefore, in case the Government of the Republic of Cuba shall be unwilling to agree to make such payments of the subven-

tion upon the completion of the laying of the track without
49 requiring some security from the Cuba Railroad Company, and it will do whatever else may be necessary to make the lines of railroad covered by the payments conform substantially in engineering features with the present line of said railroad, said Doctor Pablo Desvernine y Galdos hereby is (pursuant to the provisions of section 3, article LV, of the by-laws of the Cuba Railroad Company, a corporation of the State of New Jersey, United States of America, doing business in the Republic of Cuba, and by the authority and direction contained in resolution of the board of directors of said the Cuba Railroad Company, certified copies of which section of which by-laws, and of which resolution are hereunto annexed) made, constituted, and elected the special legal representative of said the Cuba Railroad Company, to agree by way of modification of said contract as authorized by the board of directors on February 24, 1909, that said government may retain from each of the two payments of subvention at the rate of $5,000 per kilometer such sum not exceeding $100,000 as may be returned by said Government of the Republic of Cuba to insure in each case the completion of the section covered by the payment to make such section conform substantially in engineering features with the present main line of the Cuba Railroad Company with full power of substitution and revocation, and said company hereby ratifies and confirms all that its said representative shall do or cause to be done by virtue hereof.

In witness whereof said the Cuba Railroad Company has caused its signature to tbe hereunto subscribed on its behalf by its
50 president, and its corporate seal to be hereunto affixed by its secretary, this 10th day of March, 1909.

THE CUBA RAILROAD COMPANY,
By W. C. VAN HORNE, *President.*

Attest:
HERBERT C. LAKIN,
Secretary.

Extract from the by-laws of the Cuba Railroad Company

Article LV

Section 3. The directors may elect other officers and define their powers and duties.

We, William C. Van Horne, president, and Herbert C. Lakin, secretary, of the Cuba Railroad Company, do hereby certify that the foregoing extract is a true and complete copy of the section of the by-laws of the Cuba Railroad Company, indicated, duly adopted by the stockholders of said railroad company.

In witness whereof we have hereunto set our hands and affixed
he seal of the Cuba Railroad Company, this 10th day of March,
909.

W. C. VAN HORNE,
President.

HERBERT C. LAKIN,
Secretary.

1 The Cuba Railroad Company. Certified copy of resolution of the board of directors of the Cuba Railroad Company, adopted March 8th, 1909.

Whereas, the board of directors of the Cuba Railroad, at its meet-
ng held February 24, 1909, appointed Doctor Pablo Desvernine y
Galdos the special legal representative of said company to effect a
ontract with the Government of the Republic of Cuba for the con-
truction of a line of railroad from Marti to Palma Soriano with a
ranch from Bayamo to Manzanillo, which contract should contain
provision that in case the subvention to be paid thereunder by the
Government of the Republic of Cuba should be at the rate of $5,000
er kilometer the Republic of Cuba shall pay on account of said
ubvention the sum of $500,000 whenever the railroad company shall
ave laid 100 kilometers of connected track, and shall pay the re-
ainder of said subvention when the railroad company shall have
ompleted the laying of the track for said entire line and branch
ne, and

Whereas, pursuant to said resolution, the president and secretary
f the Cuba Railroad Company duly executed and delivered to said
Doctor Pablo Desvernine y Galdos a power of attorney pursuant to
aid resolution. Now, therefore,

Resolved that in case the Government of the Republic of Cuba
hall be unwilling to agree to make such payments of the subvention
pon the completion of the laying of track without requiring some
security from the Cuba Railroad Company that it will do
2 whatever else may be necessary to make the lines of railroad
covered by the payments conform substantially in engineer-
ng features with the present main line of said railroad, said Doctor
Pablo Desvernine y Galdos be and he hereby is, pursuant to the pro-
isions of section 3, article LV, one of the by-laws of the Cuba Rail-
oad Company, made, constituted, and elected the special legal repre-
entative of said the Cuba Railroad Company to agree, by way of
odification of said contract as authorized by the board of directors
n February 24, 1909, that said government may retain from each of
he two payments of subvention at the rate of $5,000 per kilometer
uch sum not exceeding $100,000 as may be required by said Govern-
ent of the Republic of Cuba to insure in each case the completion
f the section covered by the payment to make such section conform
ubstantially in engineering features with the present main line of
he Cuba Railroad Company, with full power of substitution and
evocation, and

Resolved that the president and secretary of the Cuba Railroad Company are hereby authorized to execute, acknowledge, and deliver, on its behalf, under its corporate seal, an instrument appointing said Doctor Pablo Desvernine y Galdos such legal representative in accordance with the terms of this resolution.

We, William C. Van Horne, the president, and Herbert C. Lakin, the secretary, of the Cuba Railroad Company, hereby severally certify that the foregoing is a full, true, and correct copy of a
53 resolution of the board of directors of said company, duly passed and adopted on the 8th day of March, 1909.

Witness our hands and seal of the Cuba Railroad Company this tenth day of March, 1909.

W. C. VAN HORNE,
President.

HERBERT C. LAKIN,
Secretary.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on the 10th day of March, in the year one thousand nine hundred and nine, before me, Leonard Leaman, the undersigned, a notary public of the State of New York for county of New York, in the State of New York, duly appointed and qualified and residing in the city, county, and State of New York, personally appeared Sir William C. Van Horne, of full age, to me personally known, who being by me duly sworn according to law, on his oath, did depose and say:

That he resides in the city of Montreal, Dominion of Canada; that he is the president of the Cuba Railroad Company, the corporation described in and which executed the foregoing instrument; that the said company is a corporation; that he knows the seal of said corporation, and that the seal affixed to said instrument is the common seal of said corporation, and that it was so affixed by order of
54 the board of directors of said corporation; that said deponent, as president, signed, sealed, and delivered said instrument as the voluntary act and deed of said the Cuba Railroad Company by order of the board of directors of said corporation; that Herbert C. Lakin is the secretary of said corporation; and that deponent saw said Herbert C. Lakin, as such secretary, sign his name to said instrument, and that such signature was affixed by order of the board of directors of said corporation.

Said deponent further said that the extract from the by-laws of the Cuba Railroad Company and copy of the resolutions of the board of directors of said corporation attached to said instrument and certified by deponent as president and said Herbert C. Lakin as secretary are true copies of said extract and resolution, and that

the facts set forth in the certificates thereto are true, and that the seal affixed to said certificates is the common seal of said corporation.

W. C. VAN HORNE.

Subscribed and sworn to before me the day and year above written.

LEONARD LEAMAN,
Notary Public, New York County.

55 STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 10th day of March, in the year one thousand nine hundred and nine, before me, Leonard Leaman, the undersigned, a notary public of the State of New York for the county of New York, in the State of New York, duly appointed and qualified and residing in the city, county, and State of New York, personally appeared Herbert C. Lakin, of full age, to me personally known, who, being by me duly sworn according to law, on his oath did depose and say: That he resides in the city of New York, borough of Manhattan, State of New York; that he is the secretary of the Cuba Railroad Company, the corporation described in and which executed the foregoing instrument; that said company is a corporation; that he knows the seal of said corporation, and that the seal affixed to the said instrument is the common seal of said corporation, and that it was so affixed by order of the board of directors of said corporation; that Sir William C. Van Horne, is the president of said corporation, and that he saw the said Sir William C. Van Horne, as such president, sign, seal, and deliver the said instrument as the voluntary act and deed of the said the Cuba Railroad Company, by order of the board of directors of said corporation; and that said deponent signed his name thereto by the like order as the secretary of said corporation and as a subscribing witness to the execution of the said instrument.

Said deponent further said that the extract from the by-laws of the Cuba Railroad Company and the copy of the resolution of the board of directors of said corporation attached to said instrument and certified by said Sir William C. Van Horne and by deponent are true copies of said extract and resolution, and that the fact set forth in the certificates thereto are true, and that the seal affixed to said certificates is the common seal of said corporation.

HERBERT C. LAKIN.

Subscribed and sworn to before me the day and year above written.

LEONARD LEAMAN,
Notary Public, New York County.

57 EXHIBIT "F" TO COMPLAINT

Licentiate Pelayo Garcia y Santiago, Attorney at Law and Notary, Habana

I, Licentiate Pelayo Garcia y Santiago, attorney at law and a notary public for the district and college of this city and a resident therein.

Do hereby certify that Doctor Pablo Desvernine y Galdos, a resident of this city, of age and an attorney at law, has produced before me, to obtain a certified copy thereof, a document of the following tenor:

Number twenty-one. Subsidy

In Habana, this twenty-second day of January, one thousand nine hundred and ten, before me, Licentiate Pelayo Garcia y Santiago, attorney at law and a notary public for the district and college of this city, a resident therein, and in the presence of the witnesses hereinafter mentioned, at the Presidential Palace, where I went previously and especially summoned, appeared:

As a party of the first part, Major General Mr. Jose Miguel Gomez y Gomez, constitutional President of the Republic of Cuba, who stated that he is a native of Sancti-Spiritus, in the Province of Santa Clara, married, of legal age, and a property owned:

And as a party of the second part, Doctor Pablo Desvernine y Galdos, a native and resident of this city, married, of legal age, and an attorney at law.

They appear, Major General Jose Miguel Gomez y
58 Gomez in his capacity as constitutional President of the Republic of Cuba, representing the executive power of the nation; and Doctor Pablo Desvernine y Galdos as special legal representative for the Cuba Railroad Company, a corporation, declared and recorded as a public service railroad in volume first of registration of companies kept by the railroad commission of this Republic pursuant to the provisions contained in paragraph second, article first, chapter fourth, order number thirty-four, series nineteen hundred and two of the Military Government of Cuba, the act of incorporation or deed of organization of said company being likewise recorded in said register; the appearer being expressly empowered by the board of directors of said corporation for this execution, as shown by the power of attorney and resolution of the board of directors inserted in the deed executed before the undersigned notary under date of the twenty-fifth of March of last year, said appearer stating under oath that said power has neither been revoked, suspended, or limited in any way.

The parties appearing assert that they are in the full enjoyment of their civil rights, and having, as to my judgment they have, the necessary legal capacity for the execution of this document, Doctor Pablo Desvernine y Galdos stated:

First. That by deed executed under serial number eighty four, in this city, on the twenty-fifth day of March of the year just past, before the undersigned notary, the Cuba Railroad Company, a corporation, undertook to carry out the construction, for its
59 operation as a public service railroad, of a railroad line of standard gauge from a place about ten kilometres southeast of the Marti station, on the line of the Cuba Railroad Company, in the Province of Camaguey, in this Republic, connecting at said place and running through Bayamo, Santa Rita, Jiguani, Baire to Palma Soriano, to connect at the latter place with the line already constructed to San Luis, in the Province of Santiago de Cuba; and another line, also of standard gauge, for public service, which starting from the city of Bayamo shall run to Manzanillo, through Veguita and Yara. That said railroad lines would be constructed substantially to conform with the specification filed by the company by him represented with the railroad commission of Cuba, with no other changes than those which might and could be made, subject always to the provisions of the subsidy act of the fifth of July, nineteen hundred and six, and to the railroad law and upon approval by the railroad commission; and that said lines would be laid, as to the one connecting Marti, Bayamo, and Manzanillo, by the fifteenth of September, nineteen hundred and ten, and the one connecting Bayamo with Palma Soriano within the eight months following the latter date.

Second. That the appearer, Major General Jose Miguel Gomez y Gomez, in his capacity as constitutional President of the Republic of Cuba, in behalf of the executive power of the nation, by virtue of the power established under article first of the act of July fifth, nineteen hundred and six, bound the State to pay the Cuba Railroad Company, by way of subsidy, the sum of six thousand dollars ($6,000.00) official currency per kilometre, said kilometres
60 being payable in yearly instalments of one-sixth as the same may be constructed, all subject to the provisions contained in paragraph first of article second of the act of July fifth, nineteen hundred and six.

Third. That in said deed Mr. Desvernine y Galdos, with the representation which he had, upon accepting the subsidy in the form set forth in the foregoing paragraph, declared that the company by him represented acknowledged the right of the Republic of Cuba to cut down said subsidy to the rate of five thousand dollars ($5,000.00) per kilometre, provided at any date in which said railroad company should have laid in all one hundred kilometres of connected line, the Republic of Cuba, duly authorized therefor, should pay to the company the full amount of five hundred thousand dollars ($500,000.00), this being the total aggregate sum for said one hundred kilometres at the aforesaid rate of five thousand dollars per each, and it should also pay the remainder of the subsidy at the rate of five thousand dollars ($5,000.00) cash per kilometre when the

company should have terminated the laying of the lines from the sai
point, which is about ten kilometres southeast of Marti station t
Palma Soriano and the branch from Bayamo to Manzanillo, it bein
understood that in order that the company should be entitled to sai
respective payments it would be sufficient for it to terminate th
laying of the lines in each of the two above-mentioned sections, bu
the company undertaking, upon such payments being made, to pro
ceed at once to put said lines in the same engineering conditions ex
isting in the main line of said railroad company at present. Mr
Desvernine further recognizing the right of the Republic of Cuba
for this case of the subsidy being cut down to the rate o
61 five thousand dollars per kilometre, to pay said subsidy in
the following form: One part of the sum of five hundred
thousand dollars corresponding to the first one hundred kilometres
to be compensated by the amount of one hundred and thirty-five
thousand dollars of the then existing indebtedness of the company
to the Republic of Cuba for the loan without interest made to said
company by deed of the eighth of September, nineteen hundred and
five, executed before the notary of this city Mr. Francisco Palma y
Castillo, the Republic of Cuba also paying as part payment of the
subsidy for the remaining kilometres, with another compensation
for the sum of one hundred and sixty-nine thousand dollars of the
then existing indebtedness of the company to the Republic of Cuba
for said loan; but it being understood that aside from these sums
which may be paid through the aforementioned and respective com-
pensations all the rest of the subsidy up to its total amount, com-
puted at the rate of five thousand dollars per kilometre, should be
paid by the Republic of Cuba in official ready money and at the
dates or instalments above-mentioned and subject to the other condi-
tions established in said deed.

Fourth. That under date of the eleventh of December ultimo, the
appearer, Mr. Desvernine y Galdos, addressed the communication,
the original of which is now exhibited to me and withdrawn by said
president, and which literally copied, under my certificate as a
notary, reads as follows: "Habana, December 11 (eleven), 1909
(nineteen hundred and nine).—Mr. President of the Republic
62 of Cuba.—Honorable Sir:—The company entitled "The Cuba
Railroad Company" has the honor of forwarding to you the
present petition for the purpose of submitting to your consideration
and requesting what is hereinafter set forth.—That after the pro-
mulgation of the act of July fifth, 1906 (nineteen hundred and six)
on the subsidies to the railroad lines therein enumerated, the cor-
poration "The Cuba Railroad Company" in behalf of which I have
the honor of forwarding to you this petition, has constructed from
Marti towards the southeast ten 55 (fifty-five) kilometres and from
San Luis to Palma Soriano twenty 44 (forty-four) kilometres, or,
which is the same, in all thirty 99 (ninety-nine) kilometres, and
which are, as to these from Marti, open only to the service of cane

trains, and those from San Luis to Palma Soriano, open to public service from the transportation of passengers and freight, by resolutions passed by the railroad commission on the 13th (thirteenth) of February and on the 2nd (second) of December, 1908 (nineteen hundred and eight), respectively.—That said kilometres are a part of the line which, in the first term, is the object of preferred subsidy, according to the aforementioned act of July 5th (fifth), and that with the exception of said kilometres it has obtained from you the corresponding subsidy under public deed executed on the twenty-fifth (25th) of March of the present year, before the notary of this city, Mr. Pelayo Garcia, by yourself, and the undersigned, the latter in representation of the corporation "The Cuba Railroad Company," wherefore it is evident that said 30/99 (thirty ninety-
63 nine) kilometres already constructed form a part of the line comprised among these subsidized under the above-mention special act, and which have been constructed after the promulgation of said act, the company having begun previously the studies, measures, and plans necessary for all railroads.—Under these circumstances the company believes that the subsidy which has been granted for the rest of the line should also be granted for said 30.99 (thirty ninety-nine) kilometres, and it is so and in the following terms petitioned by this writing.—In the deed above referred to of the 25th (twenty-fifth) of March, 1909 (nineteen hundred and nine), executed by you and the undersigned, appears the power of attorney which, for the purpose of contracting the subsidy mentioned therein, was granted by the company to the party now having the honor to address you, and the same shows the resolutions passed by the said company as to accept that the subsidy for said 30.99 (thirty ninety-nine) kilometres, at the rate of $5,000.00 (five thousand dollars) instead of $6,000.00 (six thousand dollars) that is the maximum granted by the law, said power of attorney further showing the resolution passed by the company in regard to granting the government the right to pay the subsidy at the rate of $5,000 (five thousand dollars) per kilometres as to said 30.99 (thirty ninety-nine) kilometres already constructed, not in ready money, but by deducting the amount of the instalments in which, according to the act of subsidy, said subsidies are to be paid, from that in which the company is indebted to the State for the loan without interest which the said
State made it on the eighth of September, 1905 (nineteen
64 hundred and five), and which the company undertook to pay back through services rendered to the government until the year nineteen hundred and sixteen.—This form of payment, however, is accepted by the company with the precise and natural condition that, as soon as the amount of said loan shall have been totally paid and covered, the government shall pay the company in ready money and in official coins and always subject to what the act of July fifth, 1905 (nineteen hundred and five), provides for such payments, the balance which may result in favor of the company by reason of the subsidy made the subject of this writing.—Under the circumstances

I have the honor to address to you the present petition for the purpose of applying for the granting of the subsidy above mentioned for said 30.99 (thirty ninety-nine) kilometres, at the rate and in the terms hereinbefore set forth.—Yours with the greatest consideration.—The Cuba Railroad Company.—By (signed) Pablo Desvernine."

Fifth.—That by virtue of the above-inserted petition, the secretary of the treasury of the Republic address to the President the communication of which I have before me, the original and which literally copied, under my certificate as a notary, reads as follows: There is a heading that reads: "Republic of Cuba. Department of the Treasury.—Habana.—A. N.—Habana, January 10th (tenth), 1910 (nineteen hundred and ten). The Honorable Mr. President of the Republic.—Sir.—The computation of what up to the 30th (thirtieth) of June ultimo results in favor of the State in its account with the Cuba Railroad Company, is $469,752.03 (four hundred and sixty-nine thousand seven hundred and fifty-two dollars and
65 three cents), and as the 30.99 (thirty ninety-nine) kilometres of line already constructed are comprised in the first group of article first of the act of July 5th (fifth), nineteen hundred and six, and therefore entitled to the subsidy which the same establishes and which by agreement with said company is of $5,000.00 (five thousand dollars) per kilometre, the undersigned is of the opinion that the petition made by its representative may be granted, compensating the $154,950 (one hundred and fifty-four thousand nine hundred and fifty dollars), which it should receive therefor, from the instalments which the said company should pay by reason of the loan without interest made to it by the State on the eighth (8th) of September, 1905 (nineteen hundred and five).—And I have the honor to so report to you in order that, if approved, I may proceed to what may be in order with a view to close said transaction.—Very respectfully, M. Villegas.—Approved.—(Signed) Jose M. Gomez, President.

Sixth.—That in consequence of all that has hereinbefore been set forth, the honorable the President of the Republic, granting the request made by the corporation the Cuba Railroad Company, closes this present contract with the representative of the latter, under the following terms and stipulations:

First. The constitutional President of the Republic of Cuba, in the name of the executive power of the nation, by virtue of the authority established in article first of the act of July fifth, nineteen hundred and six, binds the State to pay to the corporation "The Cuba Railroad Company," by way of subsidy, the sum of five thousand dollars official coin for each kilometre of the thirty
66 ninety-nine kilometres already constructed, i. e., ten fifty-five kilometres from Marti towards the southeast, and twenty forty-four kilometres from San Luis to Palma Soriano, the first on the line of the Cuba Railroad Company, those of Marti, in the

rovince of Camaguey, in this Republic, open only to the service of ne trains, and those of San Luis to Palma Soriano, in the Province f Santiago de Cuba, open to the public service for the transporta- on of passengers and freight, by resolutions of the railroad com- ission of the thirteenth of February and second of December, nine- en hundred and eight, respectively, and constructed by said com- any after the promulgation of the said act of July fifth, nineteen undred and six.

Second. The amount of said subsidy, aggregating in all one hun- red and fifty-four thousand nine hundred and fifty dollars official oin, shall be paid by the State, by deducting that of the instalments which under the act of subsidy said subsidies are to be paid, from hat the corporation "The Cuba Railroad Company" owes the tate by reason of the loan without interest made to it by said States nder deed of the eighth of September, nineteen hundred and five, efore the notary of this city, Mr. Francisco Palma y Castillo, and hich said company undertook to pay through services rendered to e government until the year nineteen hundred and sixteen.

Third. This form of payment is understood to be with the precise onditions that as soon as the amount of said loan shall have been otally paid and covered by the corporation "The Cuba Railroad ompany," the government shall pay to said company, in ready money and official coin and always subject to what is pro- vided for such payments by the act of July fifth, nineteen hun- dred and five, the balance which may remain in favor of the ompany by reason of the subsidy made the object of this deed.

Fourth. The appearing party, Mr. Desvernine y Galdos, with the presentation he has, accepts the subsidy set forth in the foregoing auses under the terms stated.

Fifth. The appearing parties, in their respective capacities, des- nate this city, submitting to its judges and courts, for all acts, serv- g of process and proceedings arising from this contract, stating at all costs and expenses which may be caused by this deed with s certified copies and the payment of the fiscal tax shall be at the pense of the corporation "The Cuba Railroad Company."

I, the notary, warned the parties as to the provisions of the regula- ons of imposts on transfer of property concerning the payment of cal fees on this document.

It was thus stated and executed, the witnesses being Mr. Manuel uciano Diaz y Sosa and Licentiate Damaso Pasalodos y Bouflar- gue, both residents.

I, the notary, having read this deed to the executors and witnesses, their request, the former ratify its contents and sign with the tter. To all of which, as well as to being acquainted with the rties appearing, I, the notary, do certify, and that with the con- nt of the former the following corrections have been made. (Sev- al corrections follow.) Jose M. Gomez. Pablo Desvernine.— anl. L. Diaz.—Damaso Pasalodos.—L. Pelayo Garcia.

68 EXHIBIT "G" TO COMPLAINT

Number Six Hundred Thirty-eight. Subsidy for the Construction of a Railway Line and Grant

In the City of Havana, the 30th of June, 1915, before me, the Licentiate Antonio Munoz y Valdes Gomez, attorney and notary public of the notarial college and district of the same city, there appeared:

On the one part:

The Major General, Mr. Mario Garcia Menocal y Deop, President of the Cuban Republic, a native of Jaguey Grande, of mature age, married, landowner, and engineer.

Dr. Leopoldo Cancio y Luna, a native of Sancti Spiritus, of mature age, married, attorney, and resident of this city, in the borough of Vedado.

Mr. Jose Ramon Villalon y Sanchez, native of Oriente, of mature age, married, civil engineer, and a resident of this city, in the borough of Vedado.

And on the other part:

Dr. Jose Antonio Gonzalez Lanuza, native of Havana, of mature age, married, attorney, and resident of this city.

These act together:

The Major General Mario Garcia Menocal y Deop, in his capacity as President of the Cuban Republic and as representing the executive power of the Nation.

Dr. Leopoldo Cancio y Luna, in his capacity as Secretary of the Treasury of the Cuban Republic.

Mr. Jose Ramon Villalon y Sanchez, in his capacity as Secretary of Public Works of this Republic, and Dr. Jose Antonio Gon-
69 zalez Lanuza, as special legal representative of the corporation "The Cuba Railroad Company" in accordance with sufficient power for this act, which was conferred upon him expressly by the board of directors of said corporation by an agreement of September 2 last and which powers appear from the power of attorney which, on the said date, the 2nd of September last, was granted to him in pursuance of said agreement by Messrs. G. H. Whigham and Herbert C. Lakin, vice president and secretary, respectively, of the said company, before Allen E. Foster, notary of the State and county of New York, which power of attorney, duly legalized and translated into Spanish, I have had before me.

The said parties appearing before me declare that they have (and in my judgment they do have) the legal capacity required for the execution of the present contract of "Subsidy for the construction of a railway line and grant," and I, the notary, in view of prior data supplied to me for the drafting of this instrument, attest as follows:

First

That under date of July 5, 1906, there was promulgated in the ficial Gazette of the Cuban Republic the law of July 5, 1906, by ich the executive was authorized to enter into contracts for the nstruction and operation of various railway lines and among them nt of a line which, starting at the Fernandez station of the Casilda l Trinidad Railway, then leased by the Government, should end the Placetas del Sur station of the Cuba Railroad, providing also that the State should grant subsidies to the companies which would construct and keep in operation the said railway lines, as the same would progress: it being permissible to grant to h companies gratis the portion of land necessary for the lines.

Second

That under date of June 1, 1914, there was promulgated by means the Official Gazette of the Republic the law which reads as lows:

Article 1. There shall be added to the law of July 5, 1906, the fol- ving article: "The subsidy per kilometer for the construction of ailway from Casilda to Placetas del Sur shall be 6,000 pesos from silda to Fernandez and 12,000 pesos from Fernandez to Placetas l Sur, ending exactly at the triangle where the Cuban Central nects with the Cuba Railroad. In the written contract it shall stated that the concessionary company shall be obligated to carry blic correspondence gratis on the lines of this railway, and shall duce at 50% of the tariff; it shall also be obligated to al- the telegraph and telephone stations which the Government ll deem it advisable to establish at the sides of the lines."

Article 2. The construction, buildings, and equipment which are present in the possession of the State and can be utilized for the referred to shall be handed over to the enterprise which will ry out the work, provided it agrees to begin it at both ends and complete it within a term not exceeding three years.

Article 3. This law shall take effect from its publication in the Official Gazette of the Republic, and the call for bids for its construction shall be made within three months after pub- tion.

Therefore, I order that the present law be fulfilled and carried out ll its particulars.

Given at the country residence "Duranona," Marianao, the 1st June, 1914.

M. G. MENOCAL,
President.
JOSE R. VILLALON,
Secretary of Public Works.

Third

That under date of August 1, 1914, there was published in the Official Gazette of the Republic an order which in its mandatory part says:

I order—

Article 1. To secure by public bidding the construction of a railway from Casilda to Placetas del Sur, ending exactly at the triangle where the Cuban Central connects with the Cuba Railroad; and for this purpose the enterprises or individuals who may wish to construct the said line are called upon to present, on or before 2.30 o'clock of the afternoon of the 30th day of September, 1914, to the office of the secretary of public works, their proposals under sealed envelopes, setting forth and explaining in them the conditions and advantages which they offer to the State and the manner in which they propose to carry out the said railway construction, in accordance with the regulations in force in the matter, and bearing in mind all and each of the circumstances and conditions which, with regard to the construction of this line, are established in each
71 of the laws above set forth to which the same relates.

Article 2. The proposals shall be opened and read aloud in the presence of the bidders in the office of the secretary of public works, who shall make an explanatory report to the honorable President of the Republic for the adjudication of the work to the company or individual who shall offer the greatest advantages to the State, or for rejecting all of the proposals presented.

"Havana, July 27, 1914.

JOSE R. VILLALON,
Secretary of Public Works.

Fourth

That among the proposals presented which were opened and read on September 30, 1914, at 2.30 o'clock p. m., there is found the one reading as follows:

HAVANA, *September 30, 1914.*

Mr. Secretary of Public Works, Havana.

SIR: I, Jose Antonio Gonzales Lanuza, attorney, representative of "The Cuba Railroad Company," in accordance with article 111, Chapter XVII, of the Order No. 34 of February 7, 1902, beg to submit as follows:

First. That "The Cuba Railroad Company" is a public-service railroad company, duly entered on the register of the railway commission in accordance with the provisions of Article I, Chapter IV, of the Order No. 34 of 1902, proof of which I furnish by the certificate issued by said body and annexed hereto.

72 Second. That the said "The Cuba Railroad Company" has granted to me a special power, a legalized copy of which I

ex, authorizing me to submit a proposal to the executive of the an Republic relative to the construction of a railway from Cas- to Placetas del Sur referred to in the order of July 27, 1914, lished in the Official Gazette, No. 28, of August 1 of the same ', calling on enterprises that may wish to construct the said line present their proposals in a sealed envelope at this secretary's e, on or before 2.30 p. m. of September 30, 1914.

hird. That the company which I represent wishing to enter into ntract for the construction of the said railway upon the terms conditions indicated in the law of June 1, 1914, in relation to law of July 5, 1906, I in pursuance thereof formulate the follow- proposal:

The company which I represent is ready to enter into a con- t with the executive for the construction of a railway from ilda to Placetas del Sur ending exactly at the triangle where the an Central connects with the Cuba Railroad, of which line "The a Railroad Company" is the owner, provided that it shall be nted a subsidy of 6,000 pesos per kilometer from Casilda to Fer- dez and of 12,000 pesos per kilometer from Fernandez to Placetas Sur.

In the written contract it shall be stated that the company ch I represent shall be obliged, after this line shall have been ned to public use, to carry gratis public correspondence and at 50% of the tariffs small produce; it shall also obligate itself to allow the telegraph and telephone stations which the gov- ernment shall deem it advisable to establish at the sides of track zone.

The company I represent will agree to begin work at both ends to finish it within a term not exceeding three years, provided the Government shall hand over to it the construction, buildings, equipment which are now in possession of the State and may be zed for the line referred to.

* * * * * * *

There shall be stated that that part of the line which the com- y I represent has actually under construction from Placetas del to Fomento shall be included in the benefits of the subsidy, in rdance with the provisions of Article II, second paragraph, of aw of July 5, 1906.

. The company which I represent agrees that within the term of month, counting from the date of which the construction of the will be adjudicated to it, it will present plans, furnish security fulfil the other requirements prescribed by Chapter I of the r No. 34 of 1902, in accordance with the law of July 5, 1906, as soon as the said obligations have been fulfilled the proper act will be executed.

In view of all this I solicit, as representative of "The Cuba Railroad Company," that accepting these proposals there may be adjudicated to the said company the contract for the execution of the work upon the terms which have been stated.

Yours very respectfully,

(Signed) JOSE ANTONIO GONZALEZ LANUZA.

And under date of 23rd of October, 1914, there was pub-
74 lished in the Official Gazette of the Republic the decree No. 979, dated the 19th of said month and year, which in its mandatory part says:

"I order to adjudicate to The Cuba Railroad Company the construction of the railway from Casilda to Placetas del Sur" in accordance with the law of June 1, 1914. The Secretary of Public Works is charged with carrying out this decree.

Given at "Duranona" the 19th of October, 1914.

(Signed) M. G. MENOCAL,
President.

(Signed) JOSE R. VILLALON,
Secretary of Public Works.

Fifth

That as appears from documents issued by the office of the Secretary of the Treasury relative to the railway from Trinidad to Casilda, under date of May 9, 1891, the administration of this island took by forfeit, provisionally, all of the works and appurtenances of the railway from Trinidad to Casilda. * * *

Subsequently, on 23rd of February, 1906, Mr. Hugo Miguel Loubiere y Lavialle acquired, by lease, all the properties belonging to the old railway of Casilda to Trinidad; and this gentleman, under date of March 22, 1906, took over from the State the following buildings: The Trinidad station, occupying a surface area of 15,769 meters and 68 centimeters; the Trinidad warehouse, fronting on calle de Cruz Verde, and measuring 23 meters, 50 centimeters in length by 225 centimeters in width; the terminal of Trinidad, fronting on calle de Cruz Verde, 40 meters long and 12 wide; carpenter shop at Trinidad, 20 meters long and 7 meters, 75 centimeters wide; a small house in the yard of the Trinidad railway, 5 meters, 40 centimeters on each side; an administration building in Trinidad,
75 fronting on calle de Cruz Verde, consisting of a main body with two portals of 3 meters width at the front and at the back, made of rough stonework and roofs covered with Creole tile. In said administration building there were present at the time of their being taken over by Mr. Loubiere two cylindrical tanks for storing water, a tank of rough stonework, a bath with tiled tank and with its installation of piping and other accessories; a workshop at Trinidad, being a building of rough stonework and wooden roof covered with galvanized iron, which measures 22 meters in length by 11½

n width; a building in ruins at one side of the workshop in Trinidad, of which building there remained only the walls, measuring 22 neters, 50 centimeters in length by 7 meters 35 centimeters in width; small house in the yard of the railway at Trinidad, which measures meters, 50 centimeters in length by 3 meters in width without ounting a portal which it has at the front.

Likewise, Mr. Loubiere, having requested from the office of the Secretary of the Treasury the exchange of the above-named buildngs in Trinidad for the cavalry barracks situated on the outskirts of the city of Trinidad, which latter building measures 80 meters n front and 66 meters in depth, and the permission having been granted by the said office of the Secretary of the Treasury and possession having been taken accordingly, the matter was thus carried out, receiving the said building from Mr. Hugo Miguel Loubiere y Lavialle.

Under date of April 20, 1906, the measurement of the grounds eased by the State was proceeded with, the area being ascertained as 16,138 square meters and 50 square centimeters, within the following boundaries: at the north by lands of Misses Edita and Elvira Gandara; at the east by the calle de Iznaga; at the south by lands of the State and the maritime zone, and at the vest by lands at 10 meters from the railway which separates it from he main street; this surface being a rectangle of 161 meters—65 entimeters from north to south and 99 meters 65 centimeters from ast to west.

* * * * * * *

Sixth

That under date of May 13 of the present year there was dictated he decree published in the Gazette of the 17th of the same month, which literally copied reads as follows:

"Office of the Secretary of Public Works. Decree No. 617. Whereas, by the law of July 5, 1906, this Executive was authorized o grant gratis, in favor of the railway lines subsidized by the said aw, the portion of land necessary for the lines. Whereas, according to the law of June 1, 1914, the construction, buildings and equipment at present in the possession of the State, which can be utilized or the railway line from Casilda to Placetas del Sur, shall be transferred to the enterprise which will carry out the work, provided it grees to begin it at both ends and to complete it within a term not onger than three years. Whereas, the construction of the said line as adjudicated to "The Cuba Railroad Company" by a decree of October 19, 1914, the concessionary company having obligated itself o present the plans, to furnish security and to fulfil the other equirements prescribed by Chapter X of the Order No. 34 of 1902, in accordance with the law of July 5, 1906, and as soon as the said obligations should be fulfilled it would execute the respective contract. Whereas, the said company has obligated itself

to begin the said line at both ends and to complete it within a term not longer than three years, and has complied with all the requirements, furnished security and presented the plans. Therefore, making use of the powers which the constitution grants to me, and on the recommendation of the Secretary of Public Works, I order: Let there be granted by this executive to "The Cuba Railroad Company" the respective subsidy document, in which there shall be stated the transfer gratis of the land necessary for the lines and of the construction, buildings and equipment at present in the possession of the State and utilizable for the railway line from Casilda to Placetas del Sur. The Secretaries of the Treasury and of Public Works shall be charged with carrying out the present decree, each of them in so far as the matter comes within his province. Given at Havana at the Presidential Palace the 12th day of May, 1915. M. G. Menocal, President. J. R. Villalon, Secretary of Public Works."

I, the notary, certify to the correctness of the copy and report, and Dr. Jose Antonio Gonzalez Lanuza declares:

Seventh

That "The Cuba Railroad Company" obligates itself to construct the public service railway line of normal gauge between Casilda and Placetas del Sur, upon the terms and conditions appearing from the accepted proposal, which has been inserted in the fourth clause of the present document.

The President of the Republic, in the name of the executive power of the nation, sets forth:

78 Eighth

That by virtue of the authority conferred by Article I of the law of July 5, 1906, and in the law of July 1, 1914, he obligates the State to pay to "The Cuba Railroad Company," as a subsidy, the amount of six thousand pesos in official money for each kilometer from Casilda to Fernandez; and twelve thousand pesos, likewise in official money, for each kilometer from Fernandez to Placetaz del Sur, ending exactly at the switch where the "Cuban Central" connects with the "Ferrocarril de Cuba," said subsidy being payable in annual sixths, as the construction work progresses; all this subject to the provisions of the first paragraph of Article II of the law of July 5, 1906, there being included in the benefits of the subsidy, the section of line which "The Cuba Railroad Company" has already constructed from Placetas del Sur towards Fomento, in accordance with the provisions of Article II, paragraph 2, of the law last referred to.

Dr. Leopoldo Cancio y Luna says:

Ninth

That in his capacity as Secretary of the Treasury of the Republic of Cuba, and in accordance with the provisions of article 169 of the

rganic law of the executive power he grants, that he transfers in
ie name of the State and in favor of "The Cuba Railroad Com-
any" the construction, buildings, equipment, etc., which are at
resent in the possession of the State, utilizable for the line referred
, as well as the grounds which belong to the State in connection
with the old railway from Casilda to Fernandez and have
been used for its purpose, among which there are those which
have been explained in detail, with the proviso as regards the
ovable property, that it will be understood that there are trans-
rred those which are found among those actually inventoried or
hich may be claimed from third persons who may possess them
nlawfully, even though they may not be included in the inventory,
s long as they come from the old Trinidad railway and are the
roperty of the State: transferring to it furthermore all the rights
f the old Trinidad railway as a public service railway, compatible
ith the present railway law.

Tenth

That in the same manner he transfers in favor of "The Cuba
ailroad Company" the pier which belonged to the old Trinidad
ailway; and with reference to the one employed at present and
elonging to the State, in its present condition with its property,
e transfer the right to use the same, with the obligation to attend to
s maintenance.

Mr. Jose Ramon Villalon y Sanchez says:

Eleventh

That he concurs in the present instrument for the purpose of
rrying out the decree No. 617 of May 13 of the present year, which
copied in the sixth clause.

Dr. Jose Antonio Gonzales Lanuza says:

Twelfth

That he accepts in favor of "The Cuba Railroad Company" the
ntents of the preceding clauses and he hands over to me, to be
tached to the final document of the present act, as I do, a certi-
ficate from the railway commission certifying to the presenta-
tion of plans and the furnishing of the security referred to in
decree No. 617 of May 13 of the present year inserted herein-
ove.

The parties appearing before me add:

Thirteenth

That they designate this city and its courts for the purpose of
ving carried out in it whatever judicial and extrajudicial steps
ay arise from this instrument, renouncing expressly any juris-
ction of (their) domicile.

I, the notary, gave all the parties appearing before me, the cautions required by law.

Thus they grant it, in the presence of the documentary witnesses, Messrs. Julio Sanguily y Echarte and Rodolfo A. Catala, citizens who assure (me) that they are not legally disqualified from acting in this capacity.

This instrument having been read by me, the notary, to the parties appearing before me and to the witnesses, all of them having elected to waive the right, which I advised them they had, to do it themselves (meaning, reading the document), the first-named (meaning the parties) ratify its contents and sign together with the second-named (meaning the witnesses).

To all of which I certify, as well as to (my) knowing the gentlemen appearing before me, their occupations and citizenship, and that what follows meets with the express approval of all. (Here follow corrections.)—M. G. Menocal—Jose R. Villalon—Leopoldo Cancio—J. A. Gonzales Lanuza—J. R. Sanguily—Rodolfo A. Catala.

81 Antonio Munoz, Licenciate Jacobo Patterson, temporary secretary of the railway commission, do certify: That in a record on file in the archives of the railway commission, in my charge, relatively to the project of a line Placetas del Sur and Casilda and to the alteration of two roads Real de Fomento and diversion of a road on the line Placetas del Sur to Fomento, there appears a document which copied literally reads as follows:

HAVANA, *November 19, 1914.*

To the Manager of the Cuba R'd Co.

SIR: At the meeting held by the commission the 17th day of this month, the following action was taken:

There was considered a written communication from The Cuba R'd Co. of the 4th inst. in which it states that by Presidential Decree No. 979 of October 19th 1st, published in the Official Gazette of the 23rd of the same month, the President of the Republic decided to adjudicate to this company the construction of a railway from Casilda to Placetas del Sur, in accordance with the Law of June 1, 1914.

That in harmony with the proposal made by the Company it now begs to comply with the provisions of Chapter X of Order 34, annexing in duplicate, a description, plan and profile of the projected line.

There are included in part in this project, the branch lines of Manicaragua and Fomento already approved by the commission, with the modification of changing the connection of the new line with the main line of the Company for a distance of 674.81 meters, with the object of complying strictly with the provisions of the Law of June 1 of this year, which requires that the connection shall

82 be made exactly at the triangle where the Cuban Central connects with the F. C. de Cuba.

The numbering of kilometers has been revised in accordance with this modification, continuing this numbering in consecutive order to

Casilda, the Manicaragua line remaining as a branch line of this Trinidad line, beginning to count the kilometers from its connection toward Manicaragua, which (branch line) will now have a length of 31.154 kilometers.

There is annexed a certificate from the Corporation of Trinidad to the effect that there has been filed with said Corporation that part of the project which relates to said Municipality, but this procedure has not been followed with the parts relating to the Corporations of Placetas and Sta. Clara, for the reason that this has taken place at the presentation, in October, 1910, of the plans for the construction of the Manicaragua and Fomento branch lines.

There is also annexed a check of the management to the order of the Secretary of the Treasury, for the sum $12.524.60 (obviously meaning $12,524.60) which added to the $11,920.00 (meaning $11,920.00) previously deposited guarantee the construction of the 122.222 kilometers, of which 9.068 kilometers (this seems to be an error for 91.068 kilometers) corresponds to the line from Placetas to Casilda, and 31.154 kilometers to the Manicaragua branch.

The commission, in conformity with the report of the General Inspection of Railways, decides to approve the project above referred to, upon the following conditions:

1st. The diversion of the road which it is intended to make at kilometer 21 parallel to the track zone, to then pass under the
83 same, shall be given a certain inclination (angle) skirting the hill, in order to avoid its unnecessary rise to immediately descend (again).

2nd. It is believed that at kilometer 41, 50 and 55 there can be eliminated the curves, the central angles of which are 12° 33′, 26° 34′ and 6° 33′, respectively.

3rd. At the crossing of the Agabama river it will be advisable to eliminate the curves on both sides, even though this may adversely affect the angle of the crossing and involve more cutting.

4th. At kilometer 47 the course of the Agabama river shall be diverted, or the line shall in some other way be removed from the influence of the same.

5th. At kilometer 60 and 66 the direction of the roads shall be altered, so that the angle at which the crossing is effect shall not be smaller than 45°.

6th. At kilometer 83 the road shall be diverted with the object of eliminating two crossings."

I have the honor to inform you of the above by order of the President.

Respectfully,

(Signed) F. V. Molina,
Temporary Secretary of the Railway Commission.

And at the request of Mr. Jose A. Gonzales Lanuza, representative of The Cuba R'd Co., by order of the President, with his signature

and with the seal of the Commission, I issue these presents at Havana the 7th of April, 1915.

[SEAL] LICENTIATE JACOBO PATTERSON,
Temporary Secretary of the Railway Commission.

JOSE R. VILLALON,
President of the Railway Commission.

84 This copy is for the administration of the Treasury of the fiscal[1] (?) of Sta. Clara.

(Signed) Dr. JOSE MARIANO DEL TORTILLO,
Temporary substitute.

85 In United States District Court

[Title omitted.]

Notice of motion for judgment

Sirs: Please take notice that the defendant above named will move this court at a term thereof for the hearing of motions to be held in room 235 of the United States Courts and Post Office Building, Broadway and Park Row, in the borough of Manhattan, city, county, and State of New York, on the 22nd day of January, 1924, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting judgment dismissing the second amended complaint herein upon the ground that it appears upon the face thereof that the said complaint does not state facts sufficient to constitute a cause of action.

Yours, etc.,

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant. Office and P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

To LORD, DAY & LORD, Esqs.,
Attorneys for Plaintiff,
25 Broadway, New York City.

Dated: New York, JANUARY 18, 1924.

86–87 In United States District Court

[Title omitted.]

[1] Illegible in original.

Opinion

Filed June 11, 1921

Lord, Day & Lord, attorneys for plaintiff; Howard Mansfield, counsel.

Francis G. Caffey, United States Attorney, for defendant-demurrant; Richard S. Holmes and Ferdinand Tannenbaum, counsel.

AUGUSTUS N. HAND, *District Judge:*

The plaintiff seeks to recover income taxes paid under duress, and the defendant demurs to the complaint. The Cuba Railroad Company built one of its railroad lines under an agreement with the Cuban Government authorized by an act of the Congress of that Government that it would reduce by one-third its charges for Gov-
ernment transportations, would transfer troops in case of war
87a at a reduced ra e, and would reduce passengers' fares over its
lines, and that after the completion of the railroad the Gov-
ernment transportations, would transfer troops in case of war per kilometer in six annual instalments. The railroad built another line under a contract with the Cuban Government whereby it was to receive six thousand dollars per kilometer to be paid as the work progressed, in six annual instalments, and was to transport mails free of charge, transport minor fruits at half rates, and permit the Government to maintain telegraph and telephone lines on its right of way.

The lines of railroad were completed and annual payments were made to the plaintiff by the Cuban Government on which an income tax was claimed to be due for the years 1911 to 1916, inclusive. This tax was paid under protest and amounted to $20,239.18. A further income tax of $13,685.14 was paid by the railroad and afterwards returned by the United States Government because of a miscalculation of the rate and was accepted by the railroad. The plaintiff now seeks to recover back the sum of $20,239.18, with interest, and also interest between the date of payment and the date of return on $13,685.14.

The question is whether the instalments paid by the Cuban Government were principal or income. Certainly they would not seem
to be income in the ordinary sense. It is true that the first
8 line of railroad had to be, and was, completed by the company
before the subsidies were paid, and in the case of both lines there was something to be done on the part of the railroad in future by the terms of the contract. But can the subsidies be regarded in any proper sense as gains derived from capital or labor? Stratton's Independence, Ltd. v. Howbert, 231 U. S. 398. The fixing of rates is certainly a common provision in Government contracts granting railroad franchises, and the real consideration for the payment of the subsidy was the agreement to build the road and operate it. For

that agreement a franchise to operate it on prescribed terms and a subsidy payable in six annual instalments was granted. Suppose a subscriber for stock agreed to pay in his subscription in six annual instalments after a railroad was completed. The subscriber's return would consist of a chance to receive dividends in the future. The Government's return in this case was to be secured by the development of the island through the construction and operation of the railroad, the privilege on the part of the Government of placing telegraph and telephone wires on the right of way, and of securing the carriage of mails and passengers, produce, and troops upon prescribed terms. The fixing of rates is apparently a proper subject of governmental regulation. Would a subscription to stock
89 be income because payable after the railroad was completed? I cannot see the merit of such a contention. The purpose seems clear to add to the funds of the railroad company doubtless for the purpose of providing equipment or repaying obligations incurred in construction. Whatever the purpose of the subsidies, they in no way resemble earnings. They have but the remotest resemblance to a gain from either capital or labor.

The English cases where annual contributions were made to assist in paying interest charges on construction bonds are not in point. Such subsidies have been fairly held to be income because they were intended to relieve the companies from annual charges against income.

So far as annual subsidies were required to be used to form a sinking fund to amortize obligations incurred in construction, I think the English decisions are of doubtful correctness. They are defended as to the items to be devoted to payment of a sinking fund upon the ground that the whole sum making up the annual subsidy was paid as income, and the fact that after receipt a portion of it had to go to a sinking fund did not alter its original character. The court said in the case of Blake v. Imperial Brazilian Rv., 2 Gt. Britain, 590:

"When once the thing is ascertained as being subject to income tax it matters not what is done with it afterwards. When once it has come within the grasp of the income tax acts it is liable
90 to income tax whatever may be its destination or whatever use it may be put to."

Whether the above reasoning be sound or not, no such situation confronts us here, for the payments are not derived from capital and labor, and are not to relieve annual interest charges against capital, but are contributions made within a short period to pay the railroad for constructing its lines and agreeing to run them on prescribed terms. I cannot see how the subsidies are to be income in any practical business sense.

No interest can be allowed on the sum of $13,685.14 repaid by the Commissioner after discovering his mistake in calculating the tax and accepted by the company. Stewart v. Barnes, 153 U. S. 456.

The demurrer is overruled.

A. N. H.
D. J.

JUNE 11, 1921.

91 In United States District Court

[Title omitted.]

Notice and order reentry of judgment

Filed Feb. 5, 1924

Please take notice that an order of which the within is a copy was entered in the office of the clerk of the District Court for the Southern District of New York on the 24th day of Jan., 1924.

Dated, New York, N. Y., February 5, 1924.

Yours, etc.

LORD, DAY & LORD,
Attorneys for Plaintiff,
25 Broadway, Borough of Manhattan, City of New York.

To WILLIAM HAYWARD, Esq.,
United States Attorney,
United States Post Office Bldg., Borough of Manhattan,
City of New York.

[Title omitted.]

92 The defendant having duly moved for an order granting judgment dismissing the second amended complaint herein upon the ground that it appears upon the face thereof that the said second amended complaint does not state facts sufficient to constitute a cause of action, and said motion having duly come on to be heard, and due deliberation having been had

Now on motion of Lord, Day & Lord, attorneys for the plaintiff, and on the decision filed herein, it is hereby

Ordered that said motion be, and the same hereby is denied, and it is

93 Further ordered that the plaintiff may enter final judgment herein for the sum of twenty thousand two hundred thirty-nine and 18/100 dollars ($20,239.18) together with interest thereon from January 12, 1918, and for its costs to be taxed.

AUGUSTUS N. HAND.
D. J.

[File endorsement omitted.]

94 In United States District Court

[Title omitted.]

Judgment

(Filed Feb. 6, 1924)

The defendant's motion for a judgment dismissing the second amended complaint herein upon the ground that it appears upon the face thereof that said second amended complaint does not state facts sufficient to constitute a cause of action having duly come on to be heard before the Honorable Augustus N. Hand, United States District Judge, at a stated term of this court, and due deliberation having been had thereon, and the court having handed down its opinion denying said motion, and an order having been duly made and entered on the 23rd day of January, 1924, denying defendant's motion and directing that the plaintiff have final judgment against the defendant for the sum of twenty thousand two hundred thirty-nine and 18/100 dollars ($20,239.18), together with interest thereon from January 12, 1918, and for its costs to be taxed, and the costs of the plaintiff having been taxed in the sum of fifteen and 55/100 ($15.55) dollars,

Now, on motion of Lord, Day & Lord, attorneys for the plaintiff, it is

95 Adjudged that the plaintiff recover of the defendant the sum of twenty-seven thousand six hundred two and 91/100 dollars ($27,602.91), being the amount claimed with interest thereon from January 12, 1918, and the further sum of fifteen and 55/100 ($15.55) dollars costs, amounting in all to the sum of twenty-seven thousand six hundred eighteen and 46/100 dollars ($27,618.46) and that said plaintiff have execution against the defendant therefor.

Judgment signed this 6th day of February, 1924.

ALEX GILCHRIST, jr.,
Clerk.

[File endorsement omitted.]

96 In United States District Court

[Title omitted.]

Judge's certificate of probable cause

The above-named defendant having moved for judgment dismissing the complaint herein and said motion having duly come on to be heard by this court on the 22nd day of January, 1924, and an order having been duly made and entered herein on the 23d day of January, 1924, denying the motion of the defendant herein and ordering that the plaintiff have final judgment against the defendant for the relief prayed for in the bill of complaint, to wit, for the sum of $20,239.18 and the interest thereon from January 12, 1918, at the

rate of one-half of one per cent per month, together with the costs of this action.

Now therefore, pursuant to section 989 of the Revised Statutes of the United States, I hereby certify that there was probable cause for the collection by the defendant, as collector of internal revenue for the Second District of New York of the taxes which are the subject of this action and for the amount of which judgment has been rendered against you.

Dated New York, January 24, 1924.

AUGUSTUS N. HAND,
U. S. D. J.

97 In United States District Court

[Title omitted.]

Petition for and order allowing writ of error

Filed Feb. 14, 1924

Comes now William H. Edwards, as former United States collector of internal revenue for the Second District of New York, the defendant herein, and says that on or about the 6th day of February, 1924, this court entered final judgment herein in favor of the plaintiff and against said defendant in the sum of twenty-seven thousand six hundred eighteen and 46/100 dollars ($27,618.46), in which judgment and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defendant, all of which errors more fully appear in the assignment of errors filed with this petition.

Wherefore defendant prays that a writ of error may issue in his behalf out of the United States Supreme Court for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said United States Supreme Court and that such other and further proceedings may be had herein as may be just and proper in the premises.

NEW YORK, *February 13, 1924.*

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

98 The foregoing petition is granted and the writ of error allowed.

Dated New York, February 13, 1924.

HENRY W. GODDARD,
United States District Judge.

[File endorsement omitted.]

99 In United States District Court

[Title omitted.]

Assignment of errors

Filed Feb. 14, 1924

Now comes the defendant above named and files the following assignment of errors upon which he will rely on his appeal from the judgment entered herein on the 6th day of February, 1924.

First. That the court erred in denying the defendant's motion for judgment dismissing the second amended complaint herein.

Second. That the court erred in rendering judgment against the defendant herein in the sum of $20,239.18 with interest thereon from January 12, 1918, and each part thereof.

Third. That the court erred in its construction of the act of September 8, 1916, entitled "An act to increase the revenue and for other purposes," in holding that the subsidy payments made to the plaintiff by the Government of the Republic of Cuba, and more particularly described in the second amended complaint herein, are not income taxable under said act.

Fourth. That the court erred in holding and deciding that the subsidy payments made to the plaintiff by the Government of
100 the Republic of Cuba, and more particularly described in the second amended complaint herein, are not taxable as income under the provisions of said act approved September 8, 1916, entitled "An act to increase the revenue, and for other purposes."

Fifth. That the court erred in holding and deciding that the subsidy payments made to the plaintiff by the Government of the Republic of Cuba, and more particularly described in the second amended complaint herein, are not income within the meaning of the sixteenth amendment to the Constitution of the United States.

Wherefore, defendant prays that for the errors aforesaid the judgment entered herein on the 6th day of February, 1924, be reversed with costs.

Dated New York, February 13, 1924.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant. Office & Post Office Address: U. S. Courts & Old Post Office Bldg., Borough of Manhattan, City of New York.

VICTOR HOUSE,
Special Assistant United States Attorney, of Counsel.

[File endorsement omitted.]

101 [Citation in usual form showing service on Lord, Day & Lord, filed Feb. 14, 1924 (omitted in printing).]

[File endorsement omitted.]

102 **In United States District Court**

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

WM. HAYWARD,
U. S. Attorney, Attorney for defendant,
Plaintiff in error.
LORD, DAY & LORD,
Attorneys for Plaintiff.
Defendant in error.

103 In United States District Court

[Title omitted.]

Clerk's certificate

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-four, and of the independence of the said United States the one hundred and forty-eighth.

[SEAL.]

ALEX. GILCHRIST, Jr.,
Clerk.

(Indorsement on cover:)

File No. 30,191. S. New York. D. C. U. S. Term No. 324. William H. Edwards, formerly United States collector of internal revenue for the Second District of New York, plaintiff in error, *vs.* The Cuba Railroad Company. Filed March 12th, 1924. File No. 30,191.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

WILLIAM H. EDWARDS, COLLECTOR OF Internal Revenue for the Second District of New York, plaintiff in error
v.
THE CUBA RAILROAD COMPANY, DEFENDANT in error

No. 324

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR ~~DEFENDANT~~ Plaintiff IN ERROR

STATEMENT OF THE CASE

The Government brings this writ of error to review a judgment of the District Court for the Southern District of New York for $20,239.18, with interest and costs, in favor of the Cuba Railroad Company and against the Collector of Internal Revenue. This amount represents a tax assessed against the Cuba Railroad Company based upon the receipt of certain sums of money by that company paid by the Republic of Cuba during the

years 1911 to 1916, inclusive, which the Government claims was income. The complaint alleged that these sums were not income within the meaning of the Sixteenth Amendment (p. 5). The Government moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action (p. 48). The motion was denied and final judgment in favor of the plaintiff was entered (p. 52), 298 Fed. 664. The statutes involved are the Revenue Acts of August 5, 1909, c. 6, 36 Stat. 11, 112; October 3, 1913, c. 16, 38 Stat. 114; and September 8, 1916, c. 463, 39 Stat. 756.

1. Substance of the amended complaint.

The defendant in error is a corporation organized under the laws of the State of New Jersey and owning and operating a railroad in Cuba. On the 25th day of March, 1909 (p. 3), it entered into a contract with the Republic of Cuba (Ex. E. p. 17), which contract was subsequently modified by a contract of January 22, 1910. (Ex. F. p. 32.) The contracts were authorized by an act of the Cuban Congress of July 5, 1906. (Ex. A. p. 7.)

The defendant in error agreed to construct a railroad on the Island of Cuba from Marti in the Province of Camaguey extending through Bayamo, Santa Rita, Jiguani, Baire to Palma Soriano, with a branch from Bayamo through Beguita and Yara to Manzanillo, and on all of its lines then existing or to be constructed, to reduce by one-third its charges for Government transportation, to transfer

troops in case of war at a reduced rate, and to reduce passenger fares (pp. 3, 18). The Republic of Cuba agreed to pay $5,000 per kilometer after the construction should be completed, such payments to be made in six annual installments (pp. 3, 19).

Prior to the execution of these contracts the defendant in error constructed 30.99 kilometers in reliance upon assurances made by the Republic that it would enter into such contracts in accordance with the Act of July 5, 1906, which act provided for the payment of the above sums (p. 4). That part of the line of the defendant in error covered by such contracts was completed in accordance with the terms thereof in 1911 at a cost of $4,851,595.02 (p. 4).

Thereafter the Republic of Cuba paid the following sums in the years indicated, pursuant to the terms of the contracts (p. 4).

1911	$273,702.70
1912	547,405.40
1913	150,000.00
1914	123,702.70
1915	273,702.70
1916	273,702.70
Total	1,642,216.20

On June 30, 1915, another contract was entered into between the defendant in error and the Republic of Cuba (Ex. G. p. 38) in accordance with an Act of June 1, 1914 (Ex. B. p. 9) supplementing the original Act of July 5, 1906. By the terms of this contract the defendant in error agreed to construct a railroad from Casilda through Fernandez

to Placetas del Sur, a distance of 91.086 kilometers, and to transport mails on such lines free of charge, to transport minor fruits at half rates, and to permit the Republic to maintain telephone and telegraph lines on the right of way (p. 4). The Republic agreed to pay the defendant in error at the rate of $6,000 per kilometer from Casilda to Fernandez and $12,000 per kilometer from Fernandez to Placetas del Sur, such payments to be made in six annual installments as the construction progressed (p. 4). The franchise for the construction of the branch railroad provided for in this contract was obtained on October 19, 1914, and construction thereof was begun on June 30, 1915, but has not been fully completed (p. 4). To June 30, 1919, $3,824,670.64 had been expended for such construction. The Republic of Cuba paid $54,000 in the year 1916 in accordance with the terms of such contract (p. 5).

All payments represented completed construction installments.

The total payments in yearly installments during the period from 1911 to 1916, inclusive, amounted to $1,696,216.20. The tax, recovery of which is sought in this action, was assessed upon the basis of these payments, at the rates for the respective years in which they were received.

These payments when received were credited to a " suspense account " and on June 30, 1916, were transferred to the " surplus account " and were

used for capital expenditures (p. 5). The cost of construction as carried on the books of the defendant in error was not reduced by these subsidy payments, but remained as originally charged. Depreciation was deducted on buildings and bridges, but not on the construction of the road and tracks. Shop machinery, tools, and equipment were not charged to the particular construction for which the so-called " subsidy " was paid, as this section of the railroad when completed became a part of the main line. The rates of depreciation charged were figured on the original cost. The " subsidy " payments were transferred to the surplus account, which account was used in computing the company's invested capital for the purpose of the excess profits tax returns for the year 1917 and subsequent years; that is, the " subsidy " payments were included in the invested capital under the heading, " Surplus " (p. 5).

It is claimed that the " subsidy " payments were not income within the meaning of the Sixteenth Amendment.

2. *Substance of the exhibits to the complaint.*

(a) *The Cuban Acts of July 5, 1906, and June 1, 1914.*

The Act of July 5, 1906, authorizes the President " to contract with one or several companies * * * for the construction and operation " of certain standard gauge railroad lines (p. 7). Article 2 of this Act provides for the payment of

$6,000 per kilometer in six annual installments " to the companies which shall construct and maintain in use the standard gauge lines specified in the foregoing article, as soon as the work is done." Such article further provides that any company " who has a concession from the Government for the construction of those lines, shall also enjoy the benefits accorded to the lines specified in Article 1 of this law, for every kilometer constructed after the date of the promulgation of the same " (p. 8). Article 4 of this Act provides that " the company entering into contracts with the Executive for the construction and maintenance of the railroads subsidized by the present law " shall be organized as provided by law and shall fulfill all obligations imposed by law (p. 8). Article 7 authorizes the President " to agree with the contracting companies upon any changes which may become indispensable " with regard to the routes specified (p. 9).

The Act of June 1, 1914, supplements the Act of July 5, 1906, by providing for a railway from Casilda to Placetas del Sur, for which construction 6,000 pesos per kilometer shall be paid for that part between Casilda and Fernandez and 12,000 pesos per kilometer from Fernandez to Placetas del Sur. Article 1 states that " in the written contract it shall be stated that the concessionary company shall be obligated to carry public correspondence gratis on the lines of this railway, and small produce at 50% of the tariff," and further, that "it shall

also be obligated to allow the telephone and telegraph stations which the Government shall deem advisable to establish at the sides of the lines" (p. 10). Article 2 provides that the construction, buildings, and equipment, in possession of the State shall be "handed over to the enterprise" carrying on the work "provided it agrees to begin it at both ends and to complete it within a term not exceeding three years" (p. 10).

(b) *Contracts of March 25, 1909, and January 22, 1910.*

On the 25th day of March, 1909, a contract was entered into between the duly appointed representative of the defendant in error and the President of the Cuban Republic. The defendant in error undertook to construct and operate a railroad through the points specified in the Act of July 5, 1906 (p. 18), in consideration of the payment of $6,000 per kilometer by the Cuban Government in accordance with the first paragraph of section 2 of such Act. In paragraph second of such contract it is provided, that "the Cuban Railroad Company further undertakes to reduce on all its lines constructed or to be constructed, by one-third the present tariff for the transportation of permanent employees of the Government of the Republic of Cuba, of the Rural Guard, of the Artillery, and other Government troops, and to transport over any and all of its lines at the rate of one cent per man per kilometer in special trains the troops of

the Republic which may be moved by the Government in case of war of (sic) any disturbances of the public order " (p. 18, 19).

Third, the company " * * * further undertakes to reduce on all its lines the present tariff to 2.4 cents for first-class passengers per kilometer " (p. 19).

The fifth paragraph gives to the Republic of Cuba the right to reduce the subvention to $5,000 per kilometer if the full amount of $500,000 be paid when 100 kilometers of track has been laid, and also provides that part of the subvention may be paid by cancellation of two items of indebtedness of the railroad company to Cuba dating back to 1905, amounting to $135,000 and $169,000. It also allows the Government of Cuba to retain the sum of $100,000 to guarantee performance by the company of uncompleted obligations of the company (pp. 5, 6).

The power of attorney authorizing the representative of the Cuba Railroad to enter into the above contract designates the same by the term " contract " and sets forth that such contract may provide that the railroad shall reduce its tariffs by one-third in certain cases, shall transport troops at the rate of one cent per man per kilometer, and shall reduce its tariffs for first-class passengers (pp. 21, 22, 23).

It appears by a receipt of July 12, 1907, that the Cuban Railroad Company deposited with the

Treasurer of Cuba the sum of $58,000 as a guaranty that it would construct the railway in accordance with the terms of the Act of July 5, 1906, in case that it should be awarded the contract therefor (pp. 25, 26).

A further contract was entered into on January 22, 1910, which amended the original contract above set forth by lowering the rate of payment of $6,000 per kilometer to $5,000 per kilometer. This contract recited substantially the same promises made by each party in the previous agreement and provided in addition that $154,950 should immediately be paid to the Cuban Railroad Company to represent the sum of $5,000 per kilometer for the 30.99 kilometers already constructed and in use (pp. 32, 35, 37).

(c) *Contract of June 30, 1915.*

The contract of June 30, 1915, was entered into under the terms of the Act of June 1, 1914, which supplemented the Act of July 5, 1906, and provided for the construction of a railroad from Casilda through Fernandez to Placetas del Sur. The proposal of the Cuban Railroad Company as embodied in this contract stated that the company (p. 41):

> is ready to enter into a contract with the Executive for the construction of a railway * * *, provided that it shall be granted a subsidy of 6,000 pesos per kilometer from Casilda to Fernandez, and 12,000 pesos per kilometer from Fernandez to Placetas del Sur.

that

> In the written contract it shall be stated that the company * * * shall be obliged * * * to carry gratis public correspondence and at 50% of the tariffs, small produce;

and that

> it shall also obligate itself to allow the telephone and telegraph stations which the Government shall deem it advisable to establish at the sides of the track zone.

Paragraph three thereof states that the Company will agree to begin work at both ends and to finish it within three years, " provided that the Government shall hand over to it the construction, buildings, and equipment which are now in possession of the State and may be utilized for the line referred to." By the terms of paragraph eighth of the contract, the sums to be paid to the defendant in error in accordance with its terms were measured not only by the part of the road to be constructed after the execution of the contract, but also by that part already constructed by the defendant in error from Placetas del Sur toward Formento (p. 44). Under the terms of paragraphs ninth and tenth of this contract the Republic agreed to transfer to the defendant in error the railway which had been built from Casilda to Fernandez, together with all properties and appurtenances of such railroad, including its rolling stock, stations, buildings, pier, and real estate (pp. 44, 45).

STATUTES INVOLVED

Section 38 of the Act of August 5, 1909, ch. 6 (36 Stat. 11, 112) provides in part as follows:

> That every corporation * * * organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year. * * *

Subdivision (a) of paragraph G of section II of the Act of October 3, 1913, ch. 16 (38 Stat. 114, 172) provides in part as follows:

> (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation * * * organized in the United States, no matter how created or organized, * * *.

Paragraph B of Section II of the same Act (38 Stat. 167), provides in part as follows:

> That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from * * * compensation for personal service of whatever kind and in whatever form paid,

> or from * * * businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from * * * the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.

Section 10 of Title I of the Revenue Act of Sept. 8, 1916, ch. 463 (39 Stat. 756, 765), provides in part as follows:

> That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, * * * organized in the United States, no matter how created or organized * * * a tax of two per centum upon such income; * * *.

THE ISSUES

I

Do the sums paid to the defendant in error by the Cuban Government constitute a gift?

II

Do the sums paid to the defendant in error by the Cuban Government constitute income?

ARGUMENT

Prior to the assessment of the additional taxes herein sued for the Commissioner of Internal Rev-

enue had ruled that the amount received by the defendant in error from the Cuban Government constituted a donation or gift, but that donations or gifts to corporations are taxable as income under the terms of the Acts of August 5, 1909, and October 3, 1913, and the Revenue Act of 1916. The defendant in error subsequently filed a claim for refund (p. 10) upon the theory that if the amount received from the Cuban Government is a gift, it is not taxable under the Act of August 5, 1909, because the tax provided by that Act was based upon business done and the receipt of a gift could not be defined as doing business (p. 15). That it was not subject to a tax under the Act of October 3, 1913, inasmuch as the amount received as a gift did not constitute income (p. 14); and that it was not taxable under the Act of September 8, 1916, because gifts to corporations were exempt from tax by the wording of the statute itself (p. 15).

When the claim for refund was filed, the defendant in error submitted copies of the laws and contracts under which the payments by the Republic of Cuba were made. After a reconsideration of the facts, the claim was disallowed as to the amount herein in controversy because the payments were "contingent upon work performed or services rendered" and were therefore not gifts (p. 17). This view of the Department in disallowing the claim for refund is here adopted as the correct one. Therefore, inasmuch as the sums paid do not con-

stitute gifts, it is unnecessary to discuss the question whether gifts are taxable under the various acts.

I

The sums paid to the defendant in error by the Cuban Government do not constitute a gift

The facts are sufficient to show that both the defendant in error and the Government of Cuba expected services to be rendered and duties to be performed as the result of any sums paid or received. Such sums were only to be paid in pursuance of a binding contract.

The Act authorizing the payment of moneys for the construction of a railroad through certain points was passed on July 5, 1906. The original contract under which the defendant in error was enabled to receive any of such moneys was not entered into until March 25, 1909. The Act of July 5, 1906, made no gift. It only authorized the Executive to contract for services to be rendered. It contemplated that the Republic of Cuba, as the result of the expenditure of moneys, would obtain material benefits and that the company receiving such moneys would perform acts sufficient to compensate the Government for its expenditures.

By the terms of the contract of March 25, 1909, not only was a railroad to be constructed, maintained, and operated in accordance with provisions of law then existing, but the defendant in error further agreed, first, to reduce by one-third its

charges for transportation of permanent employees of the Government, the rural guard, the artillery, and other Government troops; second, to transport in special trains at the rate of one cent per kilometer for each man transported such trains or troops as the Government might move in case of war or any disturbances of the public order; and, third, to reduce its tariff for first-class passengers to 2.4 cents per kilometer. These obligations extended to the lines of the defendant in error already constructed as well as to those to be constructed. In other words, the defendant in error agreed to receive compensation for its services on lines already in operation less than it was receiving at the time the contract was entered into and to charge low rates for services rendered on that part of the road to be constructed. Certainly, in view of such consideration, it cannot be contended that the sums paid to the defendant in error in accordance with the provisions of the contract of March 5, 1909, were paid or received as gifts. The Cuban Government expected and demanded returns for the moneys paid out.

By the contract of January 22, 1910, which amended the original contract, the amount of money to be received by the defendant in error was reduced from $6,000 per kilometer to $5,000 per kilometer, and it was provided therein that certain funds should be paid immediately to the defendant in error in view of the fact that 30.99 kilometers

of the road had previously been constructed. Again, tangible evidence of the commercial intent of the Government is illustrated by this reduction in compensation for the services to be rendered.

On June 1, 1914, the Cuban Government found it necessary to provide for the construction of a railroad line between certain points in the Island not covered by the Act of July 5, 1906, and to provide further for the free delivery of public correspondence and the transportation of small produce at greatly reduced rates. An Act of such date was therefore passed in order to insure the above ends, and appropriate sums were made available for the company complying with its terms. By contract of June 30, 1915, the defendant in error not only agreed to construct this railroad but also to carry public correspondence free of charge, to transport small produce at 50% of the tariffs then existing, and to permit the Government to establish telephone and telegraph stations along its right of way. These reduced rates for freight and transportation, like those provided for in the contract of March 25, 1909, not only apply to that part of the road to be constructed but also to that part already being operated by the defendant in error.

The fact that the amount paid to the defendant in error was measured by the railroad constructed indicates that the Government did not contemplate a gift of such amount, but expected returns based upon the number of kilometers of railroad in oper-

ation. A gratuity would not have been based upon the construction of each kilometer of railroad, and the payment of such a gratuity would not have been postponed until the completion of a specified portion. It would have been paid at any time regardless of the completion of any part and would have been paid in equal installments or in one lump sum. This basis for determining, not only the amount of the payment, but also the time of the same, certainly indicates that the amount paid represented compensation to the defendant in error for the rendition of valuable services, and shows therefore that no gift of the moneys was contemplated or made.

The facts on their face are sufficient to demonstrate the futility of any argument attempting to show that the moneys paid to the defendant in error were paid by a beneficent republic to a favorite railroad. The transactions as contemplated and as completed were only for the purpose of gain. It could not be expected that such would not be the case since no subsidy or bounty is ever paid by a Government as a gift. In *Allen* v. *Smith*, 173 U. S. 389, the Supreme Court, in holding that the bounty granted by the United States Government to sugar producers was not a gift from the Government, said (p. 402):

> *Bounties granted by a Government are never pure donations,* but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be

as a "subsidy." In the contract the term "subvention" is used (p. 17). These terms have no peculiar significance in this case and do not serve in any manner to change the character of the payments. Money received as a subsidy properly constitutes income instead of a gift. In the case of *Pretoria-Pietersburg Ry. Co.* v. *Elwood,* 6 Great Britain Tax Cases 508 (K. B. D. 95, L. T. 468), the South African Republic had guaranteed to a company, which was formed to take over a railway, payment of interest at the rate of 4 per cent on its share capital. During the South African War the British military authorities seized and worked the railway, and ultimately the British Government gave notice to expropriate the railway under the terms of its concession, and undertook to pay all arrears in interest due under the guarantee. It was held that the sum paid was part of the gross revenue earned by the company as a trading company and that it constituted gross income. The court said, page 520, that the character of the payment which the British Government undertakes to make to the company is partly interest on money lent, but that the remainder "is nothing more or less than a subsidy of the nature of revenue," and that it could "see nothing in this payment which puts it in a different position to any other receipt on account of revenue." The court concluded, page 521, that "so long as they belong to revenue the decision must be in favor of the

Crown. Here there is, in our opinion, no doubt that the subsidy must go to revenue account, but that fact does not show that it represents net revenue, or is of the nature of interest on moneys."

In *Nizam's Guaranteed State Ry. Co.* v. *Wyatt*, 2 Great Britain Tax Cases 584 (L. R. 24, Q. B. D. 548), a company had constructed a railway in Hyderabad upon which the Nizam's Government guaranteed an annuity for twenty years of 5 per cent on the issued share and debenture capital, to be applied in paying interest on such capital, and in forming a sinking fund for the redemption of the debentures. The court held that the whole annuity, including the sums applied to the sinking fund, was taxable as income. On page 593 the court said:

> I look at the question, what is the money which the Nizam pays? He pays it as income, and in the company's hands it is income which they are bound no doubt to distribute in payment of their just liabilities toward the capitalists, that is to say, the holders of the shares and of the debentures, and also in raising a sinking fund, but still, nevertheless, it is income which has to be applied and appropriated in the interest of the company. I can not myself look at it in any other way than an income which, *though not earned,* has been supplied by the Nizam under his contract, and when it comes into the hands of the company I confess it strikes me that *it is precisely in the same*

> *condition as income which is earned by the company.* (See also *Blake* v. *Imperial Brazilian Railway,* 2 Great Britain Tax Cases, 58.) (Italics ours.)

In view of the facts and the decisions of the courts, it can not be held that these payments were gifts. Not only is it contrary to the established policy of any government to make gifts but in this case, as was pointed out above, no altruistic motive inspired the Government of Cuba in making provision for the payment of the sums appropriated. The paternal hand of patronage is nowhere in evidence and no facts are adduced to show that gratuitous aid was extended. Rather were these payments made for services rendered, obligations incurred, and duties to be performed. They were contingent upon work performed and services rendered or to be rendered. They were received as a result of "carrying on or doing business."

II

The sums paid to the defendant in error by the Cuban Government constitute income

It has been shown that the moneys received by the defendant in error do not constitute a gift. They were paid in pursuance of the terms of valid contracts wherein and whereby the defendant in error agreed to construct, operate, and maintain certain railroads, to reduce both freight and passenger tariffs on its lines constructed or to be constructed from Marti to Palma Soriana and from

Bayamo to Manzanillo to transport at reduced rates Government officials and members of the military forces over such lines, to haul such troop trains over such lines as the Government might order, and to carry public correspondence free of charge and small produce at 50% of the existing tariffs over the lines constructed or to be constructed from Casilda to Placetas del Sur, and to permit telephone and telegraph stations of the Government to be established at the sides of the track zone of such lines. These moneys must therefore necessarily constitute income to the defendant in error.

The Supreme Court, in *Eisner* v. *Macomber*, 252 U. S. 189, defined income as follows:

> After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Ind.* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185)—" Income may be defined as the gain derived from capital, from labor, or from both combined " provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle case. (See also *Stratton's Ind.* v. *Howbert*, 231 U. S. 399, 415.)
>
> See also *United States* v. *Phellis*, 257 U. S. 156.

It is submitted that the sums paid to the defendant in error by the Cuban Government were derived from both capital and labor combined. That the defendant in error employed capital in its business, is not to be doubted. It is to be noted that the Company already had its franchise, was a going concern. It constructed and operated railroads before any money was received from the Cuban Government. In the construction of such railroads it utilized its own capital funds. It was only because of this employment of its own capital that the defendant was enabled to receive money from the Government inasmuch as it could not have fulfilled the terms of its contracts unless its capital had not only been sufficient to permit the construction and operation of railroads, but also to enable it to perform the duties imposed upon it by the terms of its contracts. The performance of these duties also necessitated labor on the part of the corporation.

When money is paid to a railroad company in consideration of the reduction of rates, the transportation without charge of mail matter, and the granting by the railroad of certain rights of way, it is submitted that such money constitutes income within the accepted definition of that term because it is derived from a combination of capital and labor. It is paid in pursuance of a contract, but it is a gain

> proceeding from the property, severed from the capital invested * * *, and coming in, being ('derived'), that is, received or

drawn by the recipient (the taxpayer) for his separate use, benefit and disposal. (*Eisner* v. *Macomber, supra.*)

If the Railroad Company had not made the contract and received the "subsidy" thereunder, later it would have received large sums from the regular rates charged for the carriage of mail matter and the like, which would have been income. As a result of the contract, it received these sums in advance, and it could well afford to receive smaller amounts in advance, which would be income no matter how used by the road. In fact, they were carried in a "suspense account." But they were income, as well when paid in advance of the rendition of the services, as if paid at the time the services were performed. They were paid to the Railroad in payment for the transportation of mail matter free and in partial payment, for the transportation of Government employees, Government troops, and certain produce, which services were to be performed thereafter.

It must be conceded that these sums would have been income if received for these services at the time the services were performed. Therefor, it seems to follow plainly and conclusively that they are income, though paid in advance.

The Cuban Government could well afford to pay these amounts in advance in order to receive the lower rates as well as the free carriage, and to have the road constructed. While the Railroad Company could afford to receive a smaller sum in ad-

vance for these services, not only for the value of the use of the money, but also because it would need all the money it could collect from any source until it had the road in operation and the revenues therefrom. Its own funds would be spent in construction and it could use these payments for operation and like current expenses.

The Court below in its opinion ignores entirely the services to be performed by the Railroad at reduced rates or for nothing in consideration of these subsidy payments. But it is submitted that they were of large value. In our own United States, the land grant railroads charge the Government a lower rate than the regular rate for the transportation of troops or Government merchandise, and this means the saving to the United States Government of large sums of money every year. Time has proved that it was a good contract on the part of our Government.

The Court below does not consider the reduced rates granted, as a consideration, because he says the fixing of rates is a proper subject of governmental regulation. But it is submitted that would not apply here. The country needed railroads, and this ordinarily means it would be at least many years before the revenues received by the railroad would be sufficient to pay a proper return on the investment. Also it is submitted a court would not allow a government, as a regulation of rates, to fix the rates for transportation of its own employees

and troops at a lower rate than was provided for similar services to the public.

So that while the Cuban Government was anxious to have the railroad built, and was willing to make concessions to this end by arranging that mail, etc., would be carried free, and Government troops and employees would be carried at reduced rates, it only paid in advance for services it would otherwise pay for later. And by the payment in advance for these services, which was called a "subsidy," it secured the building of the railroad.

These payments, then, are income for services, though these services are not to be rendered until later.

It is a common custom on railroads in the United States, as well as in other countries, for railroad tickets to be sold in the form of mileage tickets to be thereafter used as desired. These are income, even though they are not used for years afterward, and the railroad has the use of the money.

It would seem, therefore, that it is the use of the word "subsidy" or "bonus" which is the stumbling block. But this Court will look behind the words used to see what the real facts are. And while the transaction was a desirable one to the Railroad Company, and while the Cuban Government would secure more than it paid for, it paid for future services probably much less than it would have paid for them without this arrangement.

But the payment in advance, or under the name of " subsidy " or " bonus " would not cause what is income to be changed into capital.

It has been held that money paid to railroad corporations by Governments for the construction and operation of railway lines constitutes income instead of capital. The High Court of Justice (Queen's Bench Div.) held in the case of *Nizam's Guaranteed State Railway Co.* v. *Wyatt*, 2 Great Britain Tax Cases 584 (L. R. 24 Q. B. D. 548), that an annuity paid by the Nizam's Government at the rate of 5 per cent on the issued share and debenture capital, to be applied in paying interest on such capital and in forming a sinking fund for the redemption of the debentures, constitutes taxable income. It was argued by counsel in this case that the portion of the money received for sinking-fund purposes was received, not for revenue purposes, but for a capital purpose, because such portion " is for the reduction of the capital which it is for the Nizam's advantage as a reversioner to get rid of." The court held, however, that the money received " is in every sense of the term income." Quoting from *Blake* v. *Imperial Brazilian Railway*, 2 Great Britain Tax Cases 58, the court said (p. 590):

> When once the thing is ascertained as being subject to income tax, it matters not what is done with it afterwards. When once it has come within the grasp of the Income Tax Acts it is liable to income tax whatever may be its destination or whatever use it may be put to.

Justice Hawkins, after analyzing the terms of the agreement under which the moneys were paid, discussed the same point as that involved in the case at bar at such length and with such clarity that an extended quotation from his remarks is hereafter set forth. He said (pp. 592 and 593):

> What is the meaning of these clauses when read together? It is this: You, the Company have started; you are incorporated for the purpose of forming a railway in the Nizam's territory; you have not the means yourself of offering any security at all to persons who may be disposed either to take shares or to lend money upon the debentures of the company. The Nizam is desirous, of course, of having through his country a railway made and he enters practically into this agreement: You must have from time to time capital to construct the railway, you must have capital from time to time to provide other things which are necessary for the purpose of making it fit and applicable for the purposes for which it is required; you can only get your capital by raising money upon shares or by debentures, and few people would be willing to embark the necessary amount of money to enable you to carry out your undertaking unless they had some security, at all events, for the payment of interest, and for the purpose of paying that interest and giving security to the people who invest their money I will enter into an arrangement that I will pay interest at

> the rate of 5 per cent upon the whole of your paid-up capital—that is to say * * * I will pay you upon the whole of the capital 5 per cent, although as regards the debenture capital there is only 4 per cent to be paid * * *. That of course would leave so far as they paid up the debenture capital from time to time 1 per cent interest over that which would be in the hands of the company. Then he says it must be devoted to the purpose of making a sinking fund for the payment off at the expiration of twenty years of so much of the debenture capital as the money subscribed or put to the sinking fund year by year with the accumulation by way of interest or otherwise shall admit of * * *.
>
> What is the money which the Nizam pays? *He pays it as income, and in the company's hands it is income,* which they are bound, no doubt, to distribute in payment of their just liabilities towards the capitalists; that is to say, the holders of the shares and of the debentures, and also in raising a sinking fund, but still, nevertheless, *it is income,* which has to be applied and appropriated in the interest of the company. (Italics ours.)

See also *Blake* v. *Imperial Brazilian Railway,* 2 Great Britain Tax Cases 58, where the court held that amounts received by the railway from the Government in pursuance of a contract guaranteeing interest on the capital stock of the railroad at the rate of 7 per cent were income to the railroad, even though devoted

to the payment of debenture interest, and to the formation of a sinking fund to pay off the debentures.

In *Pretoria-Pietersburg Railway Co., Ltd.*, v. *Elwood*, 6 Great Britain Tax Cases 508 (K. B. D. 95 L. T. 468), the moneys paid by the British Government to a railway, which had been guaranteed certain amounts by the South African Republic, when such railway was expropriated by the British Government, were held to be gross revenue earned by the company and subject to tax as such, even though the South African Republic had guaranteed the sum for the purpose of enabling the company to construct and operate its railway, and the British Government was under no legal obligation to carry out the moral one.

It is clear that the sums received by the defendant in error were income instead of capital. Only by ingenious argument may the contention that these sums are capital be urged at all. In such case it is appropriate here to quote the remarks of the Master of the Rolls in *Blake* v. *Imperial Brazilian Railway*, 2 Great Britain Tax Cases 58, where counsel had argued that the guarantee of the Brazilian Government of 7 per cent of the capital stock of the railway company for the payment of debenture interest and the formation of a sinking fund to pay off the debentures is a contribution of capital "in a certain number of annual payments." It was held that the sums received con-

stituted income instead of capital, and the argument of counsel was referred to as follows, p. 60:

> One of our first duties as we sit here is to keep our minds simple and clear; one of the most difficult parts of our duty when we have the involved ingenuity that sometimes is brought before us to avoid following that involved argument, and so getting our minds disturbed and rendered altogether obscure, when, if we hold ourselves firm, our minds remain in their original simplicity. Now, whenever I hear a great counsel unable to say anything to me with anything like clearness, so that really, do what I will, I can not understand what he is saying, I begin to suspect, and when he repeats that abstruse evolution many times, I am sure he does it because he knows it is so abstruse and involved that he can not possibly make me understand it. I generally listen to Mr. Moulton with the greatest possible pleasure. I listened to him on Saturday with some interest and with great surprise at the number of times he tried to say something to me, which from the beginning to the end, and now, I have never been able to understand a word of.

CONCLUSION

It is submitted that the sums paid the defendant in error by the Cuban Government do not constitute a gift, and are not capital, but are income to the Railroad Company within the meaning of the Six-

enth Amendment and the Revenue Acts of August 5, 1909, and October 3, 1913, and the Revenue Act of 1916. Therefore, the judgment of the lower court should be reversed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
NELSON T. HARTSON,
Solicitor of Internal Revenue.
FEBRUARY, 1925.

○

[illegible]

WILLIAM H. HOTCHKISS, Collector of Internal Revenue for the Second District of New York,

Plaintiff in Error,

v.

THE CURTIS PUBLISHING COMPANY,

Defendant in Error.

In Error to the District Court of the United States for the Southern District of New York.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 324

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York,
Plaintiff in Error,

v.

THE CUBA RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

The defendant in error concurs in the statement of the case in the brief for plaintiff in error; but it may be added that the judgment below for $20,239.18 with interest and costs, amounts to $27,618.46. (Record p. 52.)

The opinion of the court below is on pages 49 and 50.

ARGUMENT.

I.

The question of whether or not the sums paid to the defendant in error constitute a gift, is not, as the brief for the plaintiff in error assumes, an issue in this litigation.

The theory that the subsidies in question constituted gifts was evolved by the Deputy Commissioner of Internal Revenue on October 17, 1917 (Record p. 11). It was met by the contention of the corporation that if the subsidies were gifts, they were not taxable, in spite of the Commissioner's ruling that the Corporation Excise Tax Law of 1909 exempted only gifts to individuals (p. 13).

Subsequently, after discussion of this question, the Acting Commissioner, on July 10, 1918, ruled that the payments in question were not gifts and held that the amount thereof "was received as the result of 'carrying on or doing business' within the meaning of the special excise and income tax laws and is, therefore, properly returnable as taxable income" (p. 17).

The railroad company, accepting the views of this court in *Allen* v. *Smith*, (1899) 173 U. S. 389, that "bounties granted by a Government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized," has made no contention in this litigation that the subsidies in question constituted a gift. While agreeing with the views

of the Acting Commissioner that the amounts were turned over to the company "upon a bona fide agreement or contract that if certain operations were carried out, that is, if specified lines of railroad were constructed, * * * stipulated sums of money were to be paid," (p. 17) the defendant in error contended, as it now contends, that the amounts of the subsidies were not received as the result of "carrying on or doing business" within the meaning of the special excise and income tax laws, but were granted in consideration of "*objects of public interest to be obtained,*" and, therefore, were not properly returnable and are not taxable as income.

II.

The subsidies are not income within any meaning of the decisive definition established by the unvarying decisions of this Court in construing the Acts of Congress on which the government's claims are based.

As was said by this Court in *Merchants L. & T. Company* v. *Smietanka* (1921) 255 U. S. 509,

> "* * * there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this Court" (p. 519).

In that case this Court further said:

> "In determining the definition of the word 'income' thus arrived at, this court has consistently

> refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution" (p. 519).

Consequently the question involved in this case is to be tested by the language of this Court in *Eisner* v. *Macomber* (1920) 252 U. S. 189, 207, where it was said:

> "After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case* (pp. 183, 185)."

In applying this definition to the controversy in the case then under review, the Court italicised "the characteristic and distinguishing attributes of income essential for a correct solution" of the controversy, saying:

> "The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain', which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. *'Derived-from-capital';—'the gain-derived-*

from-capital,' etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in,* being '*derived,*' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description" (p. 207).

With this test applied, the subsidies in question cannot consistently be held to be income. The sums paid to the defendant in error by the Cuban Government were "a gain accruing to capital" and *not* "a gain, a profit or increment of exchangeable value *proceeding from* the property, *severed from* the capital"! They were not, as counsel for the plaintiff in error assert, derived from either capital or labor, or from both combined. What the capital and labor employed by the railroad company produced was, in each case, a completed railroad, from which there could be no gain except through operation. The subsidies were contributions conditioned in each case upon the completion of the railroad and, obviously, until such completion, no business could be done over the railroad or earnings be derived from it. There was no provision in the contracts for partial operation and no partial operation was attempted.

Construction was begun, and the money for completion was expended by the company from its own resources, upon the assurance and faith of the authorized agreement of the Cuban Government to reimburse the

company up to the amounts of the subsidies for its capital expenditures thus made (p. 4). Each subsidy was, therefore, a contribution to the capital of the company for a capital purpose under a contract insuring to the Government the construction of new railroads and to the public permanent rights, privileges and advantages of great value.

The case under review is the same in legal consequence as if each of the branch railroads in question had been constructed by separate corporations, newly chartered for the purpose. The subsidy in the first instance was offered to "one or several companies, either native or foreign" (p. 7) for the construction and operation of the lines specified in Article I of the Act of July 5, 1906. Companies which, at the time of the promulgation of the Act, had in course of construction for public services, standard gauge lines building to any of the places specified or which had a concession from the Government for the construction of those lines, were equally allowed the benefits of the offer.

The Act further authorized, in case of competition, a preference to the individual or company whose plans or other technical and economic conditions should be considered by the President of the Republic most advantageous for its general interest (pp. 8 and 9).

It is, therefore, immaterial to the determination of the question here involved, whether the railroads in question were constructed by the Cuba Railroad Company or by any other company, as they might have been. If either railroad had been constructed by a corporation newly chartered for the purpose and neither owning nor

operating any other railroad, nor having provided in advance any equipment for the immediate operation of its railroad, a claim that the subsidy in such case was income could scarcely have arisen; for while the contracts out of which the subsidies accrue made incidental provision for the future operation of the railroads, such operation was not made a condition precedent to the payment of the subsidies, which, in each case, became payable upon the mere completion of construction.

If the question be asked:—How does the present case differ from a case where the Cuban Government would pay the amounts of these subsidies to corporations owning similar railroads already constructed and in operation, upon agreement by them for the similar free transportation of troops and other Government privileges and similar permanent reductions of certain tariffs?; the answer is,—There is a definite, material and decisive economic distinction between the two cases.

In the case supposed, the Government would be merely bargaining with regard to terms of transportation with going concerns operating completed railroads, and the amount paid under a consequent agreement would constitute a permanent commutation of the rates involved.

In the case under review the Government, in order to secure the construction of certain railroads through unoccupied territory (see Record, p. 27), with a view to its development and the consequent public benefit, contracted in advance with a corporation having a charter adequate for that purpose, to contribute a large share of the cost of construction, providing incidentally that the

Government should permanently have certain special privileges of transportation and property rights and the public generally should have the benefit of permanent reductions in specified rates. No such privileges or reductions are imposed as conditions of the grants of the subsidies or otherwise specified in the Act of 1906 (Exhibit "A" p. 7), and it is only by the Act of 1914 that provisions of this character are required to be inserted in the subsidy contract (Exhibit "B", p. 9). The subsidies in question thus became contributions to capital resulting from a contract upon the faith of which the roads were constructed. The subsidies, when paid, went to the replacement of capital advanced to that extent by the railroad company, in accordance with the contract. Whether the amounts so advanced had been supplied from capital reserves or, more probably, from borrowed money, the subsidy payments necessarily became invested capital of the company and could only be used, as they were, for capital expenditures (Record, p. 5).

Moreover, these subsidies were not granted in lump sums, but were subventions proportionate, in each case, to kilometers of completed railroad, made payable originally under the Act of 1906 at the authorized rate of $6,000 per kilometer in six annual instalments upon completion, but reduced to the rate of $5,000, payable upon the completion of 100 kilometers of connected track. (Exhibit "E", Record, p. 19; Exhibit "F", Record, p. 33.)

Under the Act of 1914, the subsidy per kilometer for the construction of a railway from Casilda to Placetas del Sur was 6,000 pesos for a part of the line and was

made 12,000 pesos for another part, over which construction may be assumed to have been more difficult. (Exhibit "G", pp. 39, 41.)

The Government's agreement in each case was in effect that, whatever might be the actual cost of construction, it would by subvention contribute toward the replacement of that cost at a specified rate for each completed kilometer.

In other words, these subsidies were definitely measured grants in replacement of capital expenditures, and were not based upon the incomputable value of the benefits incidentally secured to the Government and the public by the contracts.

III.

It is submitted that these subsidies could not in any recognized system of railroad accounts be properly considered as income.

In Article 8 of the Act of 1906, while it is provided that the lines subsidized by that law should not enjoy any other special subsidy, direct or indirect from the State, the Province or the municipality, there was excepted from this provision the land necessary for the building of the lines, which might be ceded gratis (p. 9).

If, under this reservation, rights of way over public lands had been granted on any of the lines subsidized under that Act, how could the estimated or appraised value thereof be treated by the company in its accounts as income, having necessarily to include in capital ac-

count the railroad of which these rights of way, when built upon, would become an integral part?

This illustration finds an exact parallel in the actual situation with regard to the Casilda Branch contracted to be built in accordance with the Act of 1914. In that Act it is provided that the construction, buildings and equipment which were then in the possession of the State and could be utilized for the line referred to, should be handed over to the enterprise (p. 39).

In the contract made in accordance with the Act, the company agreed to begin work at both ends and to finish it within a term not exceeding three years, provided that the Government should hand over to it the construction, buildings and equipment which were then in possession of the State and might be utilized for the line referred to (p. 41).

It appears from the record that a railway from Trinidad to Casilda was begun as early as 1891, and that all the properties belonging to this railway, having been taken over from the State by a lessee early in 1906, were later in that year taken back by the State on an exchange of properties. On May 12, 1915, the President of the Cuban Republic, upon recommendation of the Secretary of Public Works, made this order:

> "Let there be granted by this executive to 'The Cuba Railroad Company' the respective subsidy document in which there shall be stated the transfer gratis of the land necessary for the lines and of the construction, buildings and equipment at present in the possession of the State and utilizable for the railway line from Casilda to Placetas del Sur.

The Secretaries of the Treasury and of Public Works shall be charged with carrying out the pres ent decree, each of them in so far as the matter comes within his province." (Exhibit "G", p. 44.)

It appears from this contract, that this property included a station, warehouse, terminal, carpenter shop, administration building, workshop and other buildings and grounds at Trinidad (pp. 42, 43) and a pier which belonged to the Old Trinidad Railway (p. 45); the State transferring to the company furthermore all the rights of the old Trinidad Railway as a public service railway compatible with the existing railway law (p. 45).

It may safely be assumed that all of this utilizable property ultimately became absorbed in this branch railroad. It is not perceived how it could be accounted for as income or how it could, in reason, be taxed as such; and it is submitted that with no more reason can the subsidy in connection with which it was "ceded", be so taxed.

IV.

These subsidies constituted capital investments by the Republic of Cuba in these railroads of the Cuba Railroad Company.

In the nature of the case, the purpose of the Cuban Government, as embodied in the Act passed by the Cuban Congress, July 5, 1906, was to secure, through contract with one or several companies, the construction and operation of certain standard gauge lines of

railroad for the benefit of the Cuban Republic and its citizens. These were "objects of public interest to be obtained."

To that end, Article 2 declared:

> "The Republic shall grant a subsidy up to the amount of $6,000 per kilometer, official money, payable in six parts annually, to the companies which shall construct and maintain in use the standard gauge lines specified in the foregoing article, as soon as the work is done." (Exhibit A, p. 8.)

Corporations which, at the time of this law's promulgation, had in course of construction for public service, standard gauge lines building to any of the places specified in Article 1, and which had complied with the provisions of order Number 34, of February 7, 1902, or which had a concession from the Government for the construction of those lines, were declared authorized to enjoy the benefits accorded to the lines specified in Article 1 of the Act for every kilometer constructed after the date of the promulgations of the same.

In Article 3 of the Act, it was provided that the amount necessary for the annual payment of the subsidy should be included in the general budget of the Republic (p. 8). In Article 6, it was provided that, in case of competition for the concession to build and operate the railroad lines provided for in the law, the President should give the preference to the individual or company "whose plans and other technical and economic conditions he shall consider most advantageous for the general interest of the Republic" (p. 8).

In Article 8, as already noted, land belonging to the

State necessary for the building of the lines could be ceded gratis (p. 9).

It is thus clear that the payment of these subsidies was nothing other than the investment of capital in railroad property, and, therefore, a contribution to the capital of the railroad company to be combined with its own capital investment in the same property. To the extent of the subsidies, the advances made by the railroad company, from its capital resources, toward the completion of construction necessary to secure the subsidies, were to be repaid. After such repayment, the railroad company remained, as appears from the complaint, still the larger contributor of capital in these two enterprises.

Through the contract made with the railroad company under the Act of 1914, the Cuban Government, secured not only permanent reduction of the tariff on small produce and transmission of public correspondence free of charge over the railway then agreed to be built, but the allowance of permanent easements for such telegraph and telephone stations as it might deem it advisable to establish at the sides of the lines (pp. 10, 39, 41)—another "object of public interest to be obtained," further justifying the subvention, and involving a distinct capital investment.

V.

No decision by an American Court has been found that tends to support the government's claim in this case.

The only American decision relating to a subsidy, so far as discovered by counsel, is *Oahu Railway and Land Company* v. *Pratt* (1902) 14 Hawaii, 126.

In that case an *annual* subsidy had been granted by the Territorial Legislature to the company to the extent that it should be "fairly necessary to the reasonable construction, operation and maintenance" of its railroad. It was held that such subsidy was not fairly necessary for such purpose after the railroad was completed and operated at a profit, and to the extent thereafter paid, was to be treated as income and subject to an income tax.

The Court said:

> "Is the subsidy granted plaintiff's company within the exemption? Whatever may have been the necessity for this annual subsidy to aid in the construction of the road at the time it was authorized, it is clear now, that the subsidy is not 'fairly necessary', or in any sense necessary or essential to the operation and maintenance of the road. It appears from the submission that the road is operated at a profit and that the subsidy goes only to increase the surplus earnings and the dividends declared. From these facts we conclude that the subsidy is not within the exemption." (p. 130.)

The difference between the annual subsidy considered with reference to the facts before the Hawaiian Court and the subsidies under consideration by this Court, is such as to make that decision, not only no authority for the Government's contention, but an illustrative authority in support of the railroad company's position.

VI.

The decisions cited from the British Reports of tax cases have no bearing upon the question involved in this case.

In the underlying case of *Blake* v. *Imperial Brazilian Railway*, Reports of Income Tax Cases (1884), Vol. II, 58, the question was whether or not the difference between five and one-half per cent., the interest rate of the Company's debentures, and seven per cent., received under a Brazilian Government guaranty, which difference was applied to a sinking fund for redemption of the debentures, should be taxed as income.

In the first instance, the Tax Commissioners considered that the guaranteed interest paid by the Brazilian Government was not a profit, or gain, within the meaning of the Income Tax Acts, but viewed it in the light of a contribution to the Company towards the making of the line. But, on appeal, it was held that, since there was "a guaranty of the State of interest at 7% per annum on the capital which may be fixed and acknowledged by the Government as necessary and sufficient for the construction of all the railway works for which privilege may be given, and for the acquisition of fixed rolling and other stock, for telegraph lines, for the purchase of lands, compensation for improvements and any other disbursements made before or after the commencement of the work," with provision that "during the construction of the works, interest at 7% shall be paid on the sums which may have been authorized by the Government, and lodged in a bank to be disbursed ac-

cording to the requirements thereof," the entire seven per cent. covered by the guaranty involved a payment of annual interest at that rate on the capital investment of the Company and was, therefore, income as any other interest would have been. In that case, it appeared that the entire sum for construction and equipment was to be provided by the Railway Company, and, in concurring with *Brett, M. R., Cotton, L. J.*, said:

> "In my opinion the clauses which have been referred to make it clear that this sum was to be paid as interest upon that sum, and not as a sum which was to go toward the providing of capital which was to be expended, or as a sum to be expended in the construction of the line" (p. 63).

Lindley, L. J., concurring, said:

> "To my mind it is plain that it is not a contribution to capital" (p. 64).

While the soundness of this decision may well be questioned, as it was by the court below, the difference between the two cases is so obvious as to deprive the English case of any weight as an authority here; the payment involved in that case having been made in pursuance of a specific guaranty to pay interest as such, and not made, as was payment in the present case, as a contribution to capital.

Nizam's Guaranteed State Railway Company v. *Wyatt*, Reports of Income Tax Cases (1890), Vol. II, 584, was a case where the Nizam's Government had guaranteed an annuity for twenty years at five per cent. on the issued share and debenture capital of the Com-

pany, to be applied in paying interest on such capital, and in forming a sinking fund for redemption of the debentures, subject to provisions for the repayment of the sums paid, with interest, out of profits earned.

Following the decision in *Blake* v. *Imperial Brazilian Railway*, the Appellate Court held that the whole annuity, including the sums applied to the sinking fund, was subject to tax as income. Obviously, in this case, as in the earlier case, the object of the Nizam in subscribing at five per cent. on the whole paid-up capital, was to give the Company an income whereby it would be able to fulfill its obligations by way of interest and otherwise to the holders of its shares and debentures. There is clearly no parallel between that case and the case before this court, since, in that case the Nizam's Government made no contribution to the capital required for the construction of the company's railway, but, as the court said in analyzing the agreement, the company could only get its capital "by raising money upon shares or debentures."

Again, in *Pretoria-Pietersburg Railway Company, Limited* v. *Ellwood*, Reports of Income Tax Cases (1908), Vol. VI, 508, the question was whether or not guaranteed interest on share capital at four per cent. per annum, from January 1, 1899, to November 14, 1903, amounting to £97,506, paid by the British Government, besides £387,956, paid on taking over the Company's Railway, should be treated as income. It was held that such amount of guaranteed interest on share capital was not part of the sum paid by the British Government for the property, but represented the gross revenue

earned by the Company as a trading company during the period specified, and was, therefore, subject to an income tax.

Clearly, in that case, guaranteed interest, which relieved the Company to that extent from paying out income from other sources on its interest obligations, was essentially a different thing from a contribution such as was made in the present case by way of capital investment for a capital purpose, resulting in a corresponding increase of the railroad company's capital assets.

Finally, with regard to these English decisions it may be pertinent to quote the language of this Court in *Merchants' Loan and Trust Company as Trustees* v. *Smietanka* (1921), 255 U. S. 509, 521.

> "The British income tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering, that they are quite without value in arriving at the construction of the laws here involved."

VII.

If it were doubtful whether or not these subsidies could be brought within the judicial definition of income, the doubt would have to be resolved against the Government.

As was said by this Court in *United States* v. *Merriam* (1923), 263 U. S. 179, 187:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself

with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153."

CONCLUSION.

The judgment of the lower court should be affirmed with costs.

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